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ACTION.

An action by part of the heirs for a "partition" of the estate of their mother will not be regarded in that light when it is apparent that there exists no such property to be partitioned, unless a renunciation of the community by the mother be previously set aside.

The action will be considered as a disguised one, for the nullity or rescission of such renunciation, and as such barred by the prescription of five years.

L. Ferrand vs. *Heirs of Brès et al.*, 908.

APPEAL.

Damages are allowable for a frivolous appeal from a judgment dissolving an injunction without prejudice to the rights of appellee for other damages by action on the injunction bond.

M. Carroll vs. *Chaffe, Syndic*, 83.

Damages will not be allowed, even if the appeal be frivolous, where it is *devolutive* only, and, therefore, has not delayed the appellee in the execution of his judgment. Having sustained no loss consequent on the appeal, appellee cannot recover such damages.

Chaffe, Syndic, vs. *M. Carroll*, 115.

A testamentary executor has the legal right to take and prosecute an appeal, in his official capacity, from a judgment placing the heirs in possession of the property of the succession, for which said executor had been appointed and qualified.

A bond of appeal signed by him in his capacity of executor is valid. The appearance of an appellee and urging other grounds of dismissal before that of want of citation, cures the defect of such want of citation of appeal on him.

Succession of Mrs. T. Baumgarden, 127.

When property of a judgment debtor exceeding $1,000 in value is seized in the hands of a garnishee, who asserts a right of pledge thereon for an amount exceeding $1,000, the matter in dispute between the seizing creditor and the garnishee, in proceedings under the garnishment, is appealable, although the amount of the seizing creditor's judgment may be less than $1,000.

H. Bier vs. *Gautier & Godchaux*, 206.

An appeal will lie from an order putting one in possession of an estate, when there has been no judgment to that effect. An order made

APPEAL—*Continued.*

ostensibly to execute a judgment will be vacated, if it appears that no judgment, such as would justify the order, has been rendered.

Denegre & Villeré vs. *A. Bayhi*, 255.

An appeal will not be dismissed if the appellees have not been cited, where the petition prays for citation and where a provisional syndic appeals from a judgment denying him the right to render his account, through the court, to a definitive syndic. Such judgment is not an interlocutory, but is a final judgment, from which an appeal lies.

T. R. Wood vs. *Creditors*, 257.

In neither suspensive nor devolutive appeals is citation necessary, when the appeal is taken by motion in open court at the same term when the judgment is rendered.

Judgments of courts, other than those of New Orleans, take effect only from the last day of the term at which they were rendered. Whatever may be their actual date, their legal date is the last day of the term, and therefore a party cast has ten days from the adjournment of the court in which to file his bond for a suspensive appeal.

S. L. Boyd vs. *Labranche, Sheriff*, 285.

Where it is apparent that an appellee can recover from a surety on an appeal bond the amount of the judgment appealed from, if affirmed, the appeal will not be dismissed owing to alleged deficiencies in the bond.

A. Baldwin & Co. vs. *Mumford et al.*, 348.

Where the only stipulated condition in an appeal bond is that, if the appellant shall well and truly pay, or cause to be paid, all such damages as the appellee may sustain in case it should be decided that the appeal was wrongfully obtained, the obligation is to be void, or else to remain in full force and virtue in law; the bond will not be considered as given under the law regulating the form and substance of appeal bonds.

The bond herein furnished is worded as are those required for conservatory writs.

No legal bond having been given, the appeal is dismissed.

Succession of M. Calhoun, 363.

Where the transcript does not contain the ordinance or resolution of the town council, under which the appellant was fined, or information of any kind of the terms and scope of the ordinance, the fault is imputed to the appellant, and his appeal will be dismissed.

Baton Rouge vs. *Cremonini*, 366.

APPEAL—*Continued.*

An appeal taken by petition cannot be made returnable before the expiration of the delay computable for the distance from the domicile of the appellee to the place where the appellate court is held.

Picard & Weil vs. *L. Privol*, 370.

An interlocutory degree in the lower court, sustaining plaintiff's motion to strike out of defendant's answer a reconventional demand, not signed by the Judge, is not an interlocutory judgment causing the defendant an irreparable injury, and is, therefore, not appealable.

When, in a petitory action, the defendant claims possession and use of a portion of the property in suit, under a contract or agreement with plaintiff, the title to the property and the possession of the main portion of the same are no longer in dispute, and will, therefore, not be considered as a part of the matter in dispute, which is thus restricted to the value of the right of occupation set up by the defendant.

J. L. Harris vs. *L. E. Stockett*, 387.

Examination of the differences between interlocutory and final judgments.

G. W. Cary vs. *J. P. Richardson*, 505.

A suspensive appeal lies from an interlocutory order permitting a plaintiff to bond sequestered property. Such bonding may cause irreparable injury.

Such appeal can be sought by an intervenor, in whose possession the property was when sequestered.

A mandamus lies to compel the granting of such an appeal.

State ex rel. Street vs. *Judge, etc.*, 515.

The lower court can and must pass upon the sufficiency of the appeal bond, when it is disputed by the appellee; and when the bond has been adjudged insufficient, and no other is furnished, the appeal will be dismissed.

J. Baker vs. *Shultz et al.*, 524.

The settled practice is to consider the surety to the injunction bond a party to the appeal without mention of him in the motion for appeal if his principal be appellant, and without citing him if the appeal is by petition, his principal being appellee.

L. Lavedan vs *F. F. Trinchard*, 540.

When two suits between the same parties are consolidated, they henceforward form but one, and when thus tried and decided and judgment rendered, the party cast must appeal from that judgment if he wishes relief.

APPEAL--*Continued.*

If in such a case the Judge signs another judgment, adapted to one only of these suits, and none is signed in the other but only a bill taken to his refusal to sign it, the appeal taken from the second judgment will not be dismissed, but that judgment will be annulled.

M. Vascocu, Adm'r, vs. *Woodward, Co-Executor,* 555.

The Court will not proceed to the examination of a case on an incomplete record, and where the missing paper is a part of the pleadings and has been lost, and no attempt has been made by the appellant to reproduce its contents by proceedings in the lower court contradictorily with the appellee, the appeal will be dismissed. The fault is especially imputable to the appellant where a prior appeal in the same cause has been dismissed by this Court for want of the same paper.

J. H. Smith vs. *Orleans R. R. Co.,* 559.

It is not necessary that the principals to an appeal bond should sign it. When it is signed by another, not a party to the suit and not a witness to the signatures, he will be held to have signed it as surety, although his name is not set out in the body of the bond.

J. E. Vignie vs. *Brady et al.,* 560.

Grammatical or clerical errors do not vitiate proceedings, if there be no ambiguity or uncertainty.

It is not needful that interlocutory judgments be signed by the Judge, and they may be appealed from when they may cause irreparable injury.

It is in time if the blank of the appeal bond where the amount is to be inserted is filled before the return day and before the appeal is brought up.

The petition of appeal recited the name of the suit and the judgment rendered in it, from which the appeal was taken, and the citation was addressed to the appellee without adding the title "liquidator," which had been conferred on him by the judgment; *held,* the citation was sufficient.

B. Klotz vs. *Macready et al., Executors,* 596.

Where an appeal is taken from a judgment dismissing an opposition to the homologation of an account of a syndic of an insolvent, and granting a discharge to the insolvent, and neither the creditors of the insolvent nor the syndic are made parties to the appeal, the appeal will be dismissed.

R. Rosenthal vs. *Creditors,* 618.

An order dismissing an appeal, by consent of opposite counsel, will not be disturbed by this Court on the complaint of one of the liti-

APPEAL—*Continued.*

gants that his attorney had no authority to give such consent, where there is presented an issue of facts, by affidavits and counter affidavits, requiring the exercise of an original jurisdiction.

A. Walz vs. *R. R. Co.*, 628.

The order of appeal making it returnable "on the — day of November, 1881," the appellant appeared in the court *a qua* on the 15th of that month and, suggesting the omission, asked that it be supplied, and that the 21st of November, 1881, be named as the return day. It was so done by the District Judge, and the appellant filed the transcript in this Court on said 15th of November. *Held*, that the fault was not attributable to the appellant; that the transcript was filed in good time, and that no citation on appellees was necessary in the premises.

Union Bank vs. *Legendre et als.*, 787.

Fault is imputable to an appellant, owing to deficiencies in the transcript of appeal, where it appears that the transcript was prepared in part by appellant's counsel, who had the making of it under his control and supervision.

A transcript is fatally incomplete, when it does not contain copies of certificates of registry of acts which, according to the note of evidence, were introduced in proof, and where it does not show that plans, bound with it, and bearing no character of authenticity or filing, are identically those received in evidence.

A motion for a *certiorari* to perfect the transcript, made after a motion to dismiss has been filed, and on the day of trial, cannot be granted where the transcript is defective by the fault of the mover.

Torres et al vs. *F. Falgoust*, 818.

Where an appellant fails to file the transcript on the return day, or within the legal delays thereafter, and his appeal is dismissed because such failure is imputed to his fault, he cannot renew his appeal thereafter.

The failure to seasonably file the record, without legal excuse, is considered as an abandonment of the appeal.

Mrs. Sterling vs. *Heirs of Sterling*, 840.

A motion to dismiss an appeal cannot be predicated upon a charge that the appeal is frivolous. Damages claimed because an appeal is frivolous cannot be allowed in a motion to dismiss.

W. H. Thomas vs. *Guilbeau, Sheriff*, 927.

APPEAL—*Continued.*

No appeal lies from a judgment by default rendered and signed prior to Act 24 of 1876, amending and re-enacting Art. 575, C. P., where more than one year has elapsed since the passage of that law.

Prescription of the right of appeal runs from the passage of said statute.

S. Webb, Wife, vs. *A. E. Keller*, 930.

When the record contains no order granting the appeal, it must be dismissed.

An original document purporting to be a certificate of the Judge of the District Court, declaring that the order of appeal had been granted, and directing by order at chambers that the minutes of the court be corrected, never entered or filed in the District Court, but offered for original filing in this Court, after the unreserved submission of the motion to dismiss, comes too late, and, even if considered, must be treated, not as a part of the proceedings in the District Court, but as a mere certificate of the Judge to the facts stated therein, which cannot avail to cure the absence of the order of appeal.

F. K. Phillips vs. *Creditors*, 935.

Where an appeal bond was given for the amount prescribed in the order for a suspensive appeal, and was filed within the time prescribed for such appeal, it is a good bond for a suspensive appeal, though it is recited in the body of the bond "that an appeal, suspensive or devolutive, was granted," and it is not stated for which appeal the bond was given.

E. & E. Thomas vs. *N. Bienvenu*, 936.

In a suit involving the correctness of the assessment of plaintiff's property, the jurisdiction of the Supreme Court must be tested by the amount in dispute, which is the tax which would be due on the difference between the assessment complained of and the assessment urged by the taxpayer. If such a tax does not exceed one thousand dollars, the appeal must be dismissed.

J. Block vs. *Assessor*, 965.

A judgment, partly in favor of and partly against an appellant, will not be disturbed as affecting the appellee, where no amendment is asked.

J. M. Payne vs. *T. C. Anderson et al.*, 977.

An appeal made returnable on appellant's own motion and suggestion, at a time and place other than those provided for by law, will be dismissed by the Court *ex proprio motu*. This rule applies equally in civil cases to the State, or to any of its officers appealing in their official capacities.

State ex rel. Lee vs. *Auditor, etc.*, 980.

APPEAL—*Continued.*

In proceedings *in rem*, as in ordinary cases, the jurisdiction of the appellate court must be tested by the amount in dispute, as shown by the amount claimed in the pleadings, and not by the value of the property attached, or by the amount of the judgment which is, or may be, subsequently rendered in the case.

Kahn & Bigart vs. *Sippili*, 1039.

A suspensive appeal having been dismissed for insufficiency of the transcript, the appellant is entitled to a devolutive appeal, if applied for within a year from the rendition of the judgment.

State ex rel. Cremonini vs. *Baton Rouge*, 1108.

Although a transcript contain neither note of evidence, statement of facts, bill of exceptions or assignment of error, the appeal will not be dismissed, if the clerk's certificate is complete and declares that it contains "all the testimony adduced." In such case, the court, without assignment, may inquire if there is error apparent on the face of the record.

Fazende & Seixas for Monition, 1145.

In an injunction suit to restrain a tax collector from proceeding with advertisement and sale of property for taxes, when judgment is rendered dissolving the injunction and ordering the tax collector to proceed with the sale to satisfy the taxes and naming the amount thereof, this last portion of the decree is not to be treated as a *moneyed judgment*, in estimating the amount of bond required for suspensive appeal.

State ex rel. Aymar vs. *Judge, etc.*, 1174.

Appeals will be dismissed where one bond only was furnished, under motions and orders of appeal from two judgments in two distinct and separate matters.

Successions of Clairteaux, 1178.

ATTACHMENT.

An attachment against a non-resident should not be dissolved because the petition covered by the affidavit alleges his residence to be in a named county, *Louisiana*, when the same petition refers to a petition filed by him, in which he represents himself as residing in the same county, *Indiana*. It is a clerical error, almost evident. It would be futile to dissolve an attachment in such a case, when, on proper correction, oath and bond, another would issue.

A judgment for a deposit, against which compensation could not be pleaded, can be attached by the depositary. The character of the claim has been merged into the judgment, and cannot be invoked to resist the seizure, in an action where compensation is not set up.

Citizens' Bank vs. *W. B. Hancock*, 41.

ATTACHMENT—*Continued.*

The validity of attachment process depends upon the state of facts existing at the time it was obtained. An attaching creditor may mistake his debtor's intentions, or those intentions may have been correctly divined on one day, and have been changed on the next by the fitful debtor. If the attaching creditor had good reason to believe that his debtor was about to dispose of his property to defraud his creditors, and attaches on that ground, and his process is properly served, it will not be invalidated because, in fact, the debtor afterwards absconded. Another creditor, afterwards attaching on the ground that the debtor had left the State permanently, will not take precedence of the first attachment.

S. L. Boyd vs. *Labranche, Sheriff*, 285.

The intent to defraud must exist to justify an attachment. It does not suffice that appearances indicate it.

L. C. Ferguson vs. *A. Chastant*, 339.

Where the proof shows that plaintiffs in attachment were authorized to entertain the fears declared in their petition, the execution of the writ can cause no damage. The verdict of a jury allowing such on a reconventional demand lacks foundation and must fall.

A. Baldwin & Co. vs. *Mumford, et al.*, 348.

In order to justify an attachment of his debtor's property, under the provisions of paragraphs 4 and 5 of Art. 240 of the Code of Practice, the attaching creditor must prove that the sale or disposition which the debtor is about to make of his property is with the intention of defrauding his creditors, or of giving an undue preference to some of them.

Proof that the debtor is offering his property for sale, in order to realize funds for the payment of all his debts and liabilities, accompanied by a declaration of such purpose to the attaching creditor himself, will not justify an attachment.

Lehman, Abraham & Co. vs. *McFarland & Dupré*, 624.

An attachment bond is fatally defective if it does not contain mention of the person, or of the property against which the writ issues. Its recitals should show unmistakably, and without the aid or need of extraneous proof, what or whose property is attached.

C. Kahn vs. *J. C. Ruse*, 725.

The court, before which the proceedings are instituted and under whose process property in its territorial jurisdiction may, on proper showing, attach other property of the absentee situated in the State, and in parishes not within the jurisdiction of the court.

Kahn & Bigart vs. *Sippili*, 1039.

ATTORNEY-AT-LAW.

An attorney-at-law employed to institute a suit for the revival of a judgment is not bound to cause the judicial mortgage to be reinscribed, unless he has contracted or been requested to do so, and is not liable in such case for damage or loss resulting from its peremption.

McKowan, Tutor, vs. *W. F. Kernan*, 331.

An attorney-at-law, who has been discharged by his client, cannot, against the will and orders of the latter, give bond and prosecute an appeal in his name. And an appeal so taken will be dismissed on motion of the client.

J. S. Ikerd vs. *Borland, Sheriff*, 337.

BANKS.

A settlement made by two banks through the Clearing House, in which checks are presented and exchanged, and a balance between them is struck, will be final and conclusive, if either fails to give notice of inability to meet the balance against it on the general adjustment, before the hour when banks usually pass checks to the credit of their depositors. The mutual credits thus given cannot be recalled by either one to the detriment of the other.

J. A. Blaffer et al. Commissioners, vs. *Louisiana National Bank*, 251.

BATTURE.

In suit to recover title or ownership to a batture or accretion formed in front of lands situated on the Mississippi river, the plaintiff must recover on the strength of his own title, and not on the weakness of his adversary's.

In sales of lots in the City of New Orleans fronting on the levee or river, if there exists a batture outside of the levee, susceptible of private ownership, the presumption is that the riparian owner and vendor does not convey his rights of alluvion, accretion or batture, unless the same be specially mentioned and described as being conveyed in the act of sale; and the heirs of a party holding the lot under a chain of titles, originating from such vendor, can lay no claim of ownership to such batture.

Mrs. M. E. Ferrière vs. *New Orleans*, 209.

A riparian owner expropriated, for purposes of public utility, of land fronting on a street, is not divested of his title to the batture in formation between the street and the water.

Batture property not necessary for public uses can be reduced to the private occupancy and absolute ownership of the proprietor.

F. A. Donovan, Wife, etc., vs. *New Orleans*, 461.

BILL OF EXCEPTION.

The power of determining or deciding whether the facts, as set out in a bill of exception, are true, must of necessity rest with the trial Judge. Any other rule would be impracticable, and would lead to endless dispute and inextricable confusion.

State ex rel. Hauk vs. *Judge, etc.*, 1190.

BONDS.

The holder of past due bonds and coupons of interest for several years, issued under an Act requiring the City annually to levy and collect a tax for the interest of each current year and a certain proportion of the principal, cannot, in the same action, obtain a judgment for the amount of his demand, and an order to compel the City officers to levy and collect a tax sufficient to pay the same. His monied judgment must be registered as required by Act 5 of 1870, as a condition precedent to other proceedings for satisfaction thereof.

S. Browne vs. *New Orleans*, 51.

In the absence even of suggestion to the contrary, the Court will assume that bonds, signed more than thirty years ago by the Governor of the State and other officers, were executed and issued in virtue of a power conferred by law and pursuant to its requirements.

The act of the State in purchasing her own bonds for the redemption of her debt stamps the bonds thus purchased with the insignia of validity, conformity to law, and good consideration.

Confusion did not ensue upon the State's purchase of her own bonds, and if it did, the State cannot avail herself of it, because she held them out to the world at the second sale as her valid obligations.

Cases will be decided on the pleadings of the parties and their omissions will not be supplied by the Court.

B. F. Carver vs. *Board of Liquidation*, 261.

The mandate of the Constitution, that "all property shall be taxed, etc.," is a substantial repetition of the language employed in the former Constitutions of 1864 and 1868. Under those Constitutions this mandate was always construed and executed as not applying to State or municipal bonds; and we are bound to assume that the Convention of 1879 employed the same language with a like intent.

In the absence of express language in the Constitution, or law subjecting such securities to taxation, the action of the assessors in listing them to be taxed is an attempt to impose a tax without legislative or constitutional authority.

State ex rel. DaPonte vs. *Assessors*, 651.

BONDS--*Continued.*

The defendants have authority in law to set up the plea of prescription as effectually as if the same had been raised by the City of New Orleans.

Bonds issued by the City of New Orleans are prescriptible by five years from their maturity.

The Premium Bond Act and the compliance by the City with its provisions, in preparing a list or *exhibit* of the then outstanding bonds, matured or not, do not constitute an acknowledgment and an interruption of prescription. Even if they did, five years had fully elapsed before the institution of this suit.

The right of action for payment of bonds held to be prescribed cannot be differentiated from one for an exchange of such for other bonds.

The decision in 32 An. 1250, (Conger vs. City) affirmed.

State ex rel. Rubera vs. *Board of Liquidation*, 753.

BROKERS.

A party who contracts with a broker in cotton for future delivery, with special reference to the rules of the Cotton Exchange in New Orleans, agrees thereby that his contract will be governed by such rules, and he will, therefore, be held to comply with the same.

Hence, if his contract is closed out under such rules, by reason of his broker's failure, and before its maturity, he must abide the consequences, and must make good the losses of his broker under the contract.

If the broker settles his liabilities with his creditors at the rate of fifty cents on the dollar, he cannot recover a greater proportion on the account of his principal. He is entitled to recover the amount actually disbursed by him and no more.

Williams, Pinckard & Co. vs. *J. Aroni*, 1115.

CERTIORARI.

In an application for a *certiorari*, wherein it is not charged that the Judge *arbitrarily* refused to admit legal evidence, this Court will not pass upon the correctness of his action. He had the legal power to admit, or reject evidence, and he has exercised it in the form pointed out by law.

The Supreme Court, in the exercise of its supervisory powers over inferior courts, will not transform itself into a court of appeal, for the revision of the rulings of such courts.

Where a court renders judgment in favor of a plaintiff and does not expressly pass upon a reconventional demand, the omission to do so is equivalent to a rejection of such demand.

CERTIORARI—*Continued.*

Where it is charged that a justice's court has illegally, but not arbitrarily, refused to issue its process on a call in warranty, the error, if any, was committed in the exercise of a legal discretion, and is not revisable in this Court in any form.

State ex rel. Unbehagen vs. *Justice, etc.*, 365.

CITATION.

Where a sheriff's return on a citation is irregular and void, the judgment rendered to confirm a default is a nullity and will be reversed on appeal.

Although the *return* be bad, the *service* may be good. In such a case the suit should not be dismissed, but should be remanded for further proceedings, at the cost of plaintiff and appellee in both Courts.

J. I. Adams & Co. vs. *F. A. Bazile*, 101.

COMMON CARRIER.

Where a bill of lading is pleaded as a contract and set out *in extenso* as part of plaintiff's petition, he will be held bound by all the provisions therein contained.

It is now the settled law of this country that carriers may, by express and special contract, limit their common law responsibility.

Under the contract in this case, being a through bill to San Francisco, Cal., the defendant's responsibility was expressly limited to the safe carriage of the goods over its own road and delivery to the connecting carrier, and to a guaranty of the through rate stipulated in the bill.

With reference to the guaranty, under the general law, as well as under the stipulation of the contract, defendant, as guarantor, was entitled to notice of failure of the delivering carrier to recognize the stipulated rate.

In absence of such notice, defendant is liable for no damages beyond the difference between the rate agreed and the rate demanded by the connecting carrier.

It was the duty of plaintiff to use all proper measures to protect himself from the injurious consequences of the wrongful act, and he can only recover such damages as could not thus have been prevented.

J. Tardos vs. *Chicago, St. Louis & New Orleans R. R. Co.*, 15.

Plaintiff shipped four carloads of mules from St. Louis to New Orleans, on the Iron Mountain Railroad and its connecting lines, consigned to Marx Levy. Defendant received the mules, as common carrier, at Mobile. Being unable to forward over its own line, owing to interruption, defendant forwarded the mules *via* Meridian and

COMMON CARRIER—*Continued.*

Jackson, in its own name and consigned to itself, received the mules in New Orleans, made delivery to the original consignee, and collected the freight and charges as due to itself, and in all respects dealt with the consignee as if it had been the actual carrier. By such conduct defendant made the lines, over which the mules were transported *pro hac vice*, its own, and subjected itself to the responsibilities of an actual carrier for damages suffered by the mules *en route*. Although defendant, on paying, may have its recourse against the actual carriers, it seems not to be a case for call in warranty, within the meaning of Art. 379, C. P.; and, at all events, there is failure of proof fixing the fault on the particular carrier called in warranty.

J. Levy vs. *L. & N. R. R. Co.*, 615.

A common carrier cannot seize goods for a debt due himself individually and wholly unconnected with the shipment, while they are in transit and for the safe carriage and delivery of which he has given a bill of lading. He cannot protect his private interests at the expense of his public duty as a carrier.

The carrier is in some sort a public officer, invested with power, burdened by duty, and held to reponsibility. He cannot by his own act prevent himself from doing his duty. He cannot place an obstacle in the way of performing his contract, and then plead that obstacle as an excuse for not performing it.

J. N. Pharr vs. *Collins et als.*, 939.

COMMUNITY OF ACQUETS AND GAINS.

It is now settled that the representative of a succession may sell community property to pay community debts, the interest of minors therein *non obstante*.

Where the separate funds of one spouse have been invested in property for the community, or otherwise, for its benefit, such spouse becomes a creditor of the community to that extent.

Where the husband becomes creditor in such manner, he is postponed to other creditors of the community; but, as against the wife and her heirs, his claim is perfect.

As such creditor, like any other creditor, he is entitled to have the community property sold, not only for his satisfaction, but for the necessary purpose of ascertaining the residue, if any, remaining in common.

Succession of L. Merrick, wife of L. J. Bright, 296.

The adjudicatee of real estate acquired in the name of a married wo-

COMMUNITY OF ACQUETS AND GAINS—*Continued.*

man, during the community between her and her husband, cannot be compelled to comply with the terms of the adjudication unless the presumption which makes the property a community asset has been effectually destroyed.

In such a case it is necessary for the married woman to show, not only that she had sufficient paraphernal funds, but also, that they were invested by her in the purchase of the property, and this, contradictorily with those who might have an interest to dispute her title.

The declaration of the origin of the price in the act of purchase and the admission of the husband of the truth of the facts thus stated, do not make the property paraphernal. They bind neither creditors nor forced heirs; the latter only to the extent of the disposable portion.

Although sometimes the title of married women to real estate may be perfect on its face, such is not the case where the property is purchased during the community. In such a case the married woman, of necessity, is driven to extraneous proof to establish her title, and the purchaser must submit to that evidence and accept the title, if unobjectionable.

Mrs. C. Bachino vs. *M. S. Coste*, 570.

The heirs of a deceased, who had disposed by testament of his share of the community, cannot recover a moneyed judgment against their mother and tutrix for community property adjudicated to her at the price of appraisement, and for revenue of community property realized during the minority of her children. Her right to receive their shares of the revenue and to administer their property rested exclusively on her tutorship, being deprived, under the terms of the will, of the right of usufruct of their share of the community. Under these circumstances, the only right of action of her children against her is for an account of tutorship.

For the revenue which she may realize from the succession property after the age of majority of her children, she is accountable only as a joint owner in possession of the whole property thus held in indivision.

H. F. Ludwig et al. vs. *Mrs. Weber et als.*, 579.

Where certain property is seized, under a judgment against a surviving widow, belonging to the community between her and her deceased husband, one of the heirs of the deceased cannot enjoin the sale beyond his interest in the property, although the succession of the deceased may be under administration and the community unsettled.

Offutt, Wife, vs. *Duson, Sheriff*, 986.

COMPENSATION.

Compensation cannot be validly set up in extinguishment of a claim for the price of commodities sold for *cash*, where possession of the same was obtained by an artifice or breach of trust.

The purchase price, payable *cash*, must be *paid* under the agreement.

Compensation rests essentially on good faith, and cannot take place against a claim for the restitution of a thing of which the owner has been unjustly deprived.

Article 1292, C. N., is identical with Article 2210 of our Code, and the authorities agree in that sense. Rulings in 6 An. 46, 207, 356; 7 An. 53; 28 An. 629, and other cases, affirmed.

Mutual National Bank vs. *Keenan & Slawson*, 1129.

CONFISCATION.

In a sale of property confiscated under the Act of Congress of July 17, 1862, all that could be sold was a right to the property seized, terminating with the life of the person for whose offense it had been seized.

Such proceedings and sale do not affect the rights of mortgage in favor of third persons on the property which goes to the government or to the purchaser *cum onere*.

A mortgagee under an act containing the pact "*de non alienando*" can proceed against the mortgagor, as though the latter had never been divested of his title.

Widow Avegno et al. vs. *Schmidt & Ziegler*, 585.

CONSTITUTIONAL LAW.

Revenue Act 4, Sec. 12, p. 90, 2d Ex. Sess. of 1881, is constitutional. Persons employed by a principal who has paid his license, and who do no business on their personal account, whose services, rendered within the State, are exclusively devoted to and enumerated by such principal, are "*clerks*" within the immunity of Article 206 of the Constitution, and therefore exempt from paying the license exacted from "travelling agents" under the said Act.

State ex rel. etc., vs. *C. Chapman*, 75.

Act of the General Assembly providing for a license for rice flumes inserted in the public levees is constitutional, and the parish ordinances under the provisions of said Act are legal and valid.

E. King vs. *Labranche, Tax Collector*, 305.

Warrants issued in favor of the University of Louisiana, of the Agricultural and Mechanical College, and of the University for the education of persons of color, under legislative appropriations made in obedience to Articles 230 and 231 of the Constitution, are entitled to be paid by preference over all other warrants drawn on the General Fund, with the exception of warrants issued in

CONSTITUTIONAL LAW—*Continued.*

favor of constitutional officers whose salaries are fixed by the Constitution, the latter having priority over all other warrants drawn on said fund.

State ex rel. University, etc., vs. *Burke, Treasurer*, 457.

The power granted by Art. 154 of the Constitution to the legislature, to prescribe that judicial advertisements in certain designated cities and parishes shall be made "in the French as well as in the English language," passed to the legislature untrammelled by the restrictions contained in Art. 48, relative to *local* or *special* laws.

Act 38 of 1880 is, therefore, not unconstitutional because of non-compliance with the requirements of Art. 48 of the Constitution.

The decision of the District Court, as to the extent to which warrants, baby bonds and school certificates may be used in the payment of State taxes due prior to 1879, is strictly correct.

H. Davidson vs. *Houston, Tax Collector*, 492.

The deputies designated by the Criminal Sheriff of the Parish of Orleans for duty at the Parish Prison, and as such entrusted with the legal custody of the prisoners therein confined, are *not employees of the Parish Prison*, within the meaning of Act No. 64 of the legislature of 1882, which requires that the salaries of such employees be paid by the City of New Orleans. These deputies must look to the fund created by Article 146 of the Constitution for the payment of their salaries. Courts of justice cannot overlook a clear and unambiguous constitutional provision for the purpose of ascertaining that the framers of the Constitution intended to make a different provision on the same subject matter, by an investigation into the journal of the convention.

The instrument published under the authority of the State, as the Constitution, is the organic law which all courts must expound, support and obey.

State ex rel. Brewster vs. *New Orleans*, 532.

A petition must contain allegations sufficient, if true, to entitle the party to the relief prayed.

Appropriations of money cannot now be made by the legislature for a longer time than two years. The appropriation of 1876 for pensions continued two years after the Constitution of 1879 took effect, but not longer.

State ex rel. Gras vs. *Auditor*, 537.

It having been held by the Supreme Court of the United States and by this Court, that Act No. 5 of 1870, in so far as it took away the judicial power to enforce the satisfaction of judgments by the writ of mandamus compelling the City of New Orleans to levy taxes,

CONSTITUTIONAL LAW—*Continued.*

within lawful limitations for that purpose, was unconstitutional as against prior contract creditors, that law stands as if it contained no such provision. The substantial and chief remedy existing at the date of the contract being thus left intact, that portion of the law which prohibits writs of *fi. fa.* against the City is a mere modification of the remedy within the legislative discretion and not of sufficient gravity to impair the obligations of the contract.

A. Rousseau vs. *New Orleans*, 557.

The Articles of the Constitution defining the original jurisdiction of inferior courts are not subject to the rigorous construction applicable to those defining the appellate jurisdiction of this Court, but must be construed with reference to Art. 11 of the Constitution, which guarantees adequate remedy in the courts for all legal rights. Hence, Articles 829 to 836, C. P., granting, among other things, the remedy of mandamus to compel "corporations established by law to make elections required by their charter," will not be held to be repealed by the Constitution, because the rights enforced thereby are not susceptible of pecuniary valuation; since the effect of such construction would be to leave the citizen without legal remedy to prevent violations of his legal right to vote.

Refusal to grant delay for filing application for new trial, when sufficient time has been allowed, does not constitute such nullity of proceeding as to vitiate them.

State ex rel. Donaldsonville vs. *Judge, etc.*, 637.

Act No. 9 of 1878, (Secs. 18 and 19) authorizing the assessment of taxable property omitted from rolls for previous years, is not in conflict with Article 110 of the Constitution of 1868, then in force, which prohibits *retroactive* legislation.

Such laws only as impair the obligation of contracts, or divest vested rights previously existing, or which create new rights or impose new obligations, not *in esse* before the passage of the law, partaking of the nature of *ex post facto* laws, fall under the ban of the constitutional inhibition.

The insertion of the words in the Constitution, forbidding retroactive legislation, has placed no greater restriction on the legislative power than had been put upon it by the Constitutions of 1845 and 1852.

Such constitutional restraint does not prevent the passage of remedial, healing or *curative* laws, designed to carry out a previously existing right, or to enforce an anterior obligation, otherwise barren of advantage. Particularly is such the case in matters of public concern, when the object in view is to have the burden of taxation equally shared by all upon whom it is imposed.

CONSTITUTIONAL LAW—*Continued.*

The Sections assailed are not retroactive, though retrospective. They refer to the past, but provide for a future remedy. Even were it otherwise, they are remedial or curative laws, not reached by the prohibition against retroactive legislation.

It is no valid objection to the levy and collection of a tax on the capital stock of a corporation omitted from an assessment roll, that it has since changed hands. Property liable to taxation cannot for such reason escape contribution.

The Act of 1882, No. 96, p. 128, which directs the assessment of stock to the shareholders is intended on its face to operate prospectively. It has no reference to assessments made prior to its adoption, is not *curative*, and can receive no application to the present case.

New Orleans vs. *R. R. Co.*, 679.

Act No. 98 of 1880, the object of which is to organize and put in motion the Criminal District Court for the Parish of Orleans, created by Article 130 of the Constitution, is not a *local* or *special law*, and does not fall under the ban of the Constitutional prohibition embodied in Article 48.

It has but one object and that object is expressed in its title. 33 An. 783, affirmed.

If part of Section 4 be unconstitutional, the remaining is not assailable and constitutes the Section.

State vs. *E. Dalon*, 1141.

CONTRACTS.

In the construction of an ambiguous contract, the safest mode is to ascertain the intention and meaning of the parties to the contract, as shown by their own acts, and by the manner in which they proceeded to the execution of the same.

Hence, when a party orders a cotton buyer in an inland cotton market to buy a quantity of cotton for him of a stipulated quality and of a stipulated price, and a portion of the order is filled by the buyer within a delay of eleven days, without objection as to delay on the part of the purchaser, the contract will be construed as contemplating a reasonable delay for its execution.

By consent of parties the cotton buyer may replace inferior cotton by other cotton of the required standard; and after such consent, the fact of the buyer's offer of inferior cotton in execution of orders, will not be considered as a violation on his part of the original contract.

T. H. Faries vs. *Ranger, Fatman & Co.*, 102.

The rule, that no damages can be recovered for the inexecution of a contract, when its non-performance was prevented by a fortuitous event or irresistible force, has two exceptions, one of which is when

CONTRACTS—*Continued.*

there has been some fault of the party contracting which preceded the fortuitous event, and without which the loss would not have happened; and the other when he has expressly or impliedly taken the risk of such event or force.

The non-performance of a contract for the delivery of corn is not excused by a freeze of a river, when it may be executed in another way than that first in the contemplation of the parties. If the freezing of a river be a fortuitous event, it is the duty of the party contracting to provide other means of transportation, and especially is this so when he is warned of the impending freeze, and knows the necessity of the party with whom he has contracted to have the corn delivered for reshipment.

When the circumstances show that the term was fixed in favor of the creditor, and the contract was made to enable him to fill another engagement by a stipulated time, the debtor or party contracting waits until the last day of the term at his peril, and takes the risk of weather changes which impede the execution of the contract in the manner least onerous to himself. A contract can be passively violated by not doing what was covenanted to be done at the time and in the manner implied from the nature of the contract.

Eugster & Co. vs. *J. West & Co.*, 119.

A contract couched in clear and unambiguous terms cannot be avoided as meaning a different agreement than the terms used import, and the letter of the contract must prevail, instead of invoking the remote intent of the parties.

J. McConnell vs. *New Orleans*, 273.

The failure of the City to pay cash each month for a contractor's work justifies him in abandoning his contract when such payment is expressly stipulated in it.

Expected profits from a contract to be realized in the future, which are dependent upon contingencies, cannot be included in a judgment for damages for its violation, and especially when both allegation and proof are general and vague.

A judgment against the City of New Orleans for the value of services rendered under a contract must be paid out of the revenues of the year for which the contract was made.

Thomas Bergen vs. *New Orleans*, 523.

Where a contract is made with the City Waterworks Company to procure water from the pipes and fire-plugs of the Company for a stipulated price, for the purpose of watering and sprinkling the streets, the party complying with his contract may prohibit the Company and its officers and employees from any interference with

CONTRACTS—*Continued.*

his business under the contract, and from any act to hinder or disturb him in using or procuring the required quantity from the water pipes, for the aforesaid purpose. The contract was a legal one and may be enforced.

P. Callery vs. *Water Works Co.*, 793.

A debtor's indebtedness cannot be divided without his consent, and hence, he cannot be held liable for an order on a part of his indebtedness, unless he consents to the appropriation, by his acceptance of the draft, or unless an obligation can be implied from the custom of trade, or flows from the nature of the contract between the parties.

Custom cannot prevail against a positive law.

The provisions of Act 134 of 1880 form part of the contract between railroad companies and other parties undertaking public works and their contractors. Hence, a railroad company cannot be held liable on an order for money drawn by one of its contractors, before the latter has made provisions for the payment of the wages due to his laborers, or to those of his sub-contractors, and when said company has refused to accept such order.

S. Meyer vs. *R. R. Co.*, 897.

In an action for the specific performance of an agreement to sell for cash a piece of immovable property, if it is shown that the defendant, who is a widow, had purchased the property in her own name during marriage, under the *régime* of the community, and had in good faith believed it to be her separate property, but discovered, after her agreement to sell the same, that the property belonged to the community, and that her husband's share of the same, which had accrued to her as his universal legatee, was affected with a general mortgage, resulting from a bond of tutorship, and if it appears that it is impossible for her to cancel said mortgage, there is a lawful excuse for the non-performance of her contract, as the same had been made by her through an error of law. The defendant is therefore released from the obligation of her contract.

J. H. Wilberding vs. *Widow Maher*, 1182.

CORPORATIONS.

The charter of a corporation can only be forfeited at the instance of the State.

Courts of this State are not without jurisdiction *ratione materiæ* over the subject matter of appointing receivers to corporations; but they should exercise such jurisdiction only in proper cases.

In a case where the charter of a corporation vests the liquidation in

CORPORATIONS—*Continued.*

the stockholders through commissioners elected by them, and where the stockholders consent to the appointment of receivers by the court, at the suit of creditors praying therefor, the judgment of the court appointing such receivers will not be disturbed on the appeal of creditors.

Where a court has appointed a person as receiver, who absents himself and fails to file the bond required under order of court, it lies within the discretion of the court to remove him and appoint another in his stead.

Louisiana Savings Bank, etc., 196.

A corporation is the custodian and trustee of the corporate funds, property and stock, for the stockholders; is bound to employ competent and faithful transfer agents; and responsible to the stockholders for any negligence or fraud of such agents, to their injury.

In case of illegal and unauthorized transfer of stock to a third person, the injured stockholder may contest the title of the transferree, contradictorily with both the latter and the corporation; but he is not confined to this remedy. It has been frequently held that he may sue the corporation alone for the value of his stock illegally transferred.

Under Art. 2997, the mandate to sell must be "express and special," which has been often held to mean the converse of *implied* and *general.*

The attempt to *imply* authority to sell from other acts of agent of a different character, done without authority and yet approved by principal, is in the very teeth of the Code. Nor do such facts operate as an *estoppel.*

Under the facts of this case the corporation permitted the transfer of plaintiff's property illegally and without authority from her, and is liable for its value and the dividends unlawfully divested.

Mrs. M. B. Morehouse vs. *Crescent Ins. Co.*, 238.

Where in a proceeding on the part of the State to have declared by judicial decree the forfeiture of the charter of a private corporation, on the ground of a fictitious issue of stock and insolvency, and the appointment of a liquidator is asked for, and an injunction obtained restraining the liquidators appointed by the Company from disposing of the property of the Company, or settling its affairs, a judgment dissolving the corporation, forfeiting its charter and recognizing the liquidators appointed by the Company and authorizing them to act and dissolving the injunction, will not be disturbed, in the absence of any complaint on the part of

CORPORATIONS—*Continued.*

either creditors or stockholders, and the corporation is not in debt, and when it is manifest that the action of the Company's liquidators offer no just cause of complaint.

State vs. *Herdic Coach Co.*, 245.

Officers and directors of a corporation are mandataries, and as such liable to the corporation for injuries to it resulting from their breaches of duty.

They are likewise liable for trespasses, frauds, deceits and other wrongs which they may commit against third persons. Commissioners or receivers appointed to liquidate a corporation may assert all corporate rights against unfaithful directors. They, likewise, to a certain extent, are representatives of creditors, and may, in certain cases, vindicate the rights of the latter; but they can exercise no actions of this character except such as pertain to the creditors *ut universi*, and not those which pertain to them *ut singuli*.

Analyzing the various acts charged in the petition herein against the defendant officers and directors, many of them are found to import injury only to particular creditors or stockholders, whose rights the receivers cannot champion; others are set forth too vaguely and insufficiently to sustain the action.

Raymond et al., Commissioners, vs. *E. C. Palmer et al.*, 276.

The articles of consolidation between the N. O. Gas Light Co. and the Crescent City Gas Light Co., executed under the legislative authority conferred by Act 157 of 1874, operated a complete and perfect amalgamation, the effects of which were to terminate the existence of the original corporations, to create a new corporation, to transmute the members of the former into members of the latter, and to transfer the property, rights and liabilities of each old Company to the new one.

The law authorized three-fifths of the stockholders of the original corporations to effect this consolidation, but it did not authorize them to place stock of non-participating stockholders on an inferior footing to their own, or to transfer their rights to a third person without their consent.

Plaintiff, as holder of stock in the Crescent City Gas Light Company, became entitled to the equivalent in stock of the new Company, secured by the articles of consolidation to his fellow-stockholders, and no payment or delivery to a third person, unauthorized by him, can be set up in satisfaction of his rights.

Inasmuch as plaintiff's claim is not for any particular shares of stock in the new corporation, he has nothing to do with such unauthor-

CORPORATIONS—*Continued.*

ized transferree, and need not make him a party to his suit. It is only where the claimant of particular shares of stock in a corporation encounters a rival claimant to ownership of the same, that the latter must be made a party.

J. W. Fee vs. *Gas Light Co.*, 413.

The judicial decree rendered in 1842, declaring the charter of the plaintiff forfeited, terminated its corporate existence.

The Act of 1847 laid upon the managers and directors of plaintiff the duty of requiring of the stockholders such annual payments as would accumulate a fund sufficient to meet the obligations of the State, restricting them only in this, that the equal instalments should run from one to seventeen years.

When the managers and directors accepted the terms offered them by the State in this Act, and levied a contribution of six dollars on each share of every stockholder as sufficient to meet the obligations of the State issued for this Association, a contract was thereby made by and between the State and the stockholders which neither can be permitted to violate.

The attempt of the State, by the Act of 1878, to impose a further contribution of forty dollars per share upon each stockholder, is a violation of this contract and cannot be enforced.

The annual contributions of six dollars per share are prescriptible in five years.

Consolidated Association, etc. vs. *G. J. Lord*, 425.

The plaintiff, the holder of certain bonds of the defendant Company, which had matured, accepted in renewal thereof new bonds of the Company having ten years to run, secured by mortgage on all the property and franchises of the Company, under an express contract that the Company would procure the passage of an act of the General Assembly at its next ensuing session thereafter, validating the mortgage given, so far as it included movable property, and this condition was the consideration for the extension granted. The plaintiff sues on the new bonds, alleging that they are exigible because of the failure of the Company to have the act passed. On exception that there was no cause of action, for the reason that the act in question would have been unconstitutional, and the condition was, therefore, impossible; *held*, that there was a cause of action, and a general act to effect the desired object would not be repugnant to the Constitution.

E. W. Burbank vs. *Gas Light Company*, 444.

In this State there are no general statutes compelling railroad companies to fence in their tracks. Hence, in a suit against a railroad

CORPORATIONS—*Continued.*

corporation for the recovery of the value of stock killed or otherwise destroyed by its trains and employees, the plaintiff must make his case certain, as in other suits for damages; and he must allege and prove that the injury to his property was the result of culpable negligence and carelessness on the part of the corporation or of its employees.

J. A. Stevenson vs. *N. O. Pacific R. R. Co.*, 498.

In the particular case provided for by Section 284, R. S., an action for forfeiture and liquidation of a Free Bank may be instituted by a creditor and without the intervention of the Attorney General.

The allegations of the petition herein, even if not of themselves sufficient to sustain the demand, are enlarged by the admissions contained in the answer of defendant, which are to be treated as if the same facts had been established by evidence offered and received without objection. These facts establish a state of legal insolvency and of violation of the conditions of the act sufficient to support the decree.

State ex rel. Wogan vs. *Mechanics' & Traders' Bank*, 562.

The enumeration of the various works of public utility and advantage, for which corporations were authorized in Section 683, Revised Statutes, was exemplary and not exhaustive, and all similar and analagous enterprises were covered by the concluding words, "and generally all works of public utility and advantage."

The business of establishing a wharf boat and a steam elevator at the river bank of the port of Monroe, for the convenience of river carriers and of all shippers and receivers of freight, and of carrying on, through such instrumentalities, a receiving, forwarding and storage business, falls within the purview of the law.

The members of such a corporation are not liable to be sued, as individuals, for the corporate debts.

R. P. Glen vs. *Breard et al.*, 875.

COURTS.

A Judge cannot change the minutes of his court to correct the errors of counsel; but the power is inherent in every court to correct its minutes, in chambers as well as in term, so as to make them conform to the truth.

In criminal cases, when the correction is applied for in chambers by the State, notice must be given the defendant, and *vice versa*, and in civil causes, when the change affects the rights of parties to suits, and the application comes from one of them in chambers, notice must be given the other.

Picard & Weil vs. *L. Privol*, 370.

COURTS--*Continued.*

The right of one who is not a mere trespasser, who acts under color of right as the Judge of a court, cannot be attacked collaterally. Direct and regular proceedings by the State are necessary.

State vs. *J. Williams*, 742.

The Supreme Court has no power, and will never attempt, to interfere with the discretion of District Judges in their manner of controlling their courts, or of enforcing rules of decorum or propriety therein.

Hence, the Court will not entertain a complaint that the District Judge erroneously refused to stop an attorney in the course of his argument, on the ground that his argument was unfair, improper or unbecoming.

State vs. *Duck et al.*, 764.

A Judge has a right to change the terms of the court over which he presides. He was not deprived of such authority by the Act No. 7 of 1880, which only directed how the orders fixing the terms should be made and published.

Where a term of court has been ordered to be held by the Judge under a general order fixing the terms, and subsequently he prepares another order, in which it is announced that it will not be held, and hands such order to the clerk with instructions not to record it, the Judge can, within a short time after, and before any action is taken under it, withdraw or erase the order, and the first order for the holding of the term will be in full force, and the term held under it, a legal one.

Where a change is made in the terms, it is not necessary that a notice of such change should precede the order making it, but that notice for the prescribed time should be published before the arrival or holding of the term.

Where, owing to some obstacle, the grand jury cannot be empanelled on the first day of the term, it may be empanelled on the second day.

State vs. *S. Dillard*, 1049.

CRIMINAL LAW.

APPEAL.

Where the transcript is not filed on the return day, or within the legal delay following it, the Court is impotent to grant an extension of time to file it.

The failure to do so in this case is of defendant's procurement. Sentenced to death, he made his escape before the return day, and thus the transcript was not even prepared. Captured long after

CRIMINAL LAW—*Continued.*

the last judicial day had thus elapsed, he must stand the irrevocable consequences of his rashness.

State vs. *R. Butler*, 392.

Where, in a criminal case, no objection is made by the accused or his counsel to the charge delivered in writing when given, and no bill of exceptions taken thereto, and there is no proper assignment of errors, and complaint is for the first time made in this Court with respect thereto in the brief of counsel, the matter will not be reviewed by this Court, nor the sentence disturbed.

State vs. *J. Sheard et al.*, 543.

An assignment of errors is not the proper mode of bringing up for review alleged misdirections of the lower court to the jury. Bills of exception should be taken to such portions of the charge as are objected to, or to the refusal to charge as requested, and when it is claimed that the particular facts in evidence justify or require such charge, the facts should be stated in the bill to which the charge is claimed to be pertinent.

State vs. *Riculfi et al.*, 770.

When the ruling of the trial court striking from the record a plea of *autrefois convict* has been held to have been erroneous, we cannot consider the merits of the plea which have never been passed on below, but are compelled to reverse the judgment and remand the case to be proceeded with under the reinstated plea.

State vs. *W. Bille*, 851.

The State can appeal from a judgment quashing an indictment before trial, when the offence charged is punishable capitally or at hard labor.

State vs. *A. Humphries*, 966.

EVIDENCE.

There is no authority under the laws of Louisiana or the Common law, to empower a court to issue a commission to take the testimony of witnesses residing in another State, in a criminal cause.

A new trial will not be granted with the view to introduce newly discovered evidence for the purpose of impeaching the testimony of a witness in a criminal case. Cumulative evidence cannot be considered as a sufficient ground for a new trial.

The newly discovered evidence, made the basis of the motion for a new trial, must be shown to be material and of such a nature as to change the result of the trial. The presence in court of the accused is not indispensable during the trial and disposition of

CRIMINAL LAW—*Continued.*

motions for continuance, to quash the *venire* or other proceedings of like insignificant character, not material or essential parts of the trial of the guilt or innocence of the accused.

State vs. James Fahey, 9.

Evidence as to the dangerous or vicious character of deceased is not admissible unless the proof previously administered has laid the legal foundation for the admission thereof, which, under the statements of facts made by the Judge in the bill of exceptions, has not been done in this case.

State vs. *A. Claude et al.*, 71.

In case of a conspiracy to commit a crime after such conspiracy is proved, a declaration of one of the conspirators made even out of the hearing of the other, relating to the commission of the crime, is admissible against him, but not if made after the common purpose has been consummated or abandoned. And this rule is not varied by the fact that after the commission of the offense and the arrest of the offenders, they have entered into a new conspiracy to manufacture or influence evidence favorably to themselves at the approaching trial, and the declaration of one of the conspirators in question is made whilst pursuing the purpose of the last conspiracy.

State vs. *A. Buchanan*, 89.

In a prosecution for forgery, the person whose name is alleged to have been forged is a competent witness to prove the forgery. 1 Martin, p. 214, reaffirmed.

Proof that the accused, with knowledge of the character of the instrument, attempted to pass it in the parish where the charge is brought, is sufficient proof of the venue, even where the instrument does not show on its face that it was executed in that parish.

State vs. *W. Morgan*, 293.

Though an accused be under arrest, his confession to one of those arresting and guarding him may be admitted against him where it was not induced by promises or threats, but appears free and voluntary.

State vs. *H. Revells*, 302.

Where the accused voluntarily offers evidence to prove his good character and thus opens the door for contradiction, it is legitimate for the State to tender, in rebuttal, proof of his bad reputation, the more so when the inquiry is upon cross-examination of witnesses of the defense.

District Judges are vested with a legal, not an arbitrary discretion. When they exercise such and objection is made, they should state

CRIMINAL LAW—*Continued.*

all the reasons which have induced their rulings. Facts often transpire in the presence, or are to the knowledge of Judges, the existence of which is not established by the record. Proper information would, if known, enlighten the court and enable it to test the correctness of such rulings. In the absence of such statement, those facts cannot be divined by the appellate court, which, in default, is bound to assume that the grounds stated are the only ones.

Bills of exceptions will not be considered when, even if well taken, the accused would not be benefitted thereby.

State vs. *M. Farrer*, 315.

All persons present aiding and abetting in the commission of a felony are principals, and must be indicted as such. Any testimony, therefore, to show guilt of the prisoner, whether that guilt consisted in shooting, or in being present aiding and abetting the shooting, is admissible.

State vs. *H. G. Blackman*, 483.

Where the Judge charged "that the State was bound to introduce the best evidence attainable," but refused to add that "the rule applies to the examination and analysis of the alleged blood stains," there was no error, because the first was sufficiently comprehensive to include all the evidence, and that refused, involved the assumption of the fact of an examination of blood stains and, therefore, trenched upon the facts.

Where there is no written charge of the Judge to the jury in the record, and no exception was made thereto when delivered, and no request made for a charge upon a certain point, complaint of the omission to give the charge not asked for cannot be considered.

State vs. *R. Mangrum*, 619.

The charge that the accused is presumed innocent, until the contrary is proven beyond a reasonable doubt, and that he is entitled to the benefit of a doubt, if it be substantial, is good law, and sufficiently liberal to the accused.

State vs. *Duck et al.*, 764.

Where a charge asked to be given to the jury is couched in terms calculated to tell them which of the witnesses heard they should in preference believe, and the charge requires qualification, limitation or explanation, the refusal of the Judge to give it will not be disturbed.

Giving such charge would be to trench on the facts, which the Judge is forbidden from doing. The appreciation of the facts and of the

CRIMINAL LAW—*Continued.*

credibility of witnesses is exclusively within the province of the jury.

State vs. *P. Jackson*, 769.

A Judge not only may, but should refuse to charge an abstract legal proposition which has no bearing upon the case on trial, whether the proposition be correct or incorrect, or whether it be correct in part and incorrect in part. Even if it requires qualification, limitation or explanation, it may be refused.

A bill of exceptions should contain a statement of the facts which present the question of law, and the Judge should not sign a bill containing a statement of facts at variance with his own. He has the power and the right to correct an erroneous statement in the bill.

Character is an important element in a criminal case when evidence of it is admissible, and it must be considered in connection with and as a part of the whole testimony, and due weight given to it, but it cannot destroy conclusive evidence of guilt.

State vs. *Riculfi et al.*, 770.

Although a confession made by one of two joint defendants might not be admissible as a confession against the other until proof of conspiracy, yet when made in the other's presence and implicating him and not denied by him, it may go in as a tacit admission by the latter, in absence of objection on the ground that he was under arrest on the charge at the time, and, therefore, had the right to be silent.

Proof by a witness, of subsequent statements made to him by the co-defendant, is hearsay and properly excluded.

State vs. *J. Johnson et al.*, 842.

Before a witness can be discredited on the ground of having made a contradictory statement to that made on the trial, such mode of discrediting cannot be resorted to, unless the proper foundation is first laid by asking the witness whether he had made such statement, giving the particulars of the time, place or circumstances under which it was made. Where this cannot be done, because the witness sought to be discredited is dead, the proof of such contradictory statement will not be admitted.

State vs. *S. Johnson*, 871.

Admissions and confessions may be implied from the acquiescence of the defendant in the statements of others made in his presence, when the circumstances are such as afford him an opportunity to act or speak, and would naturally call for some action or reply from a person similarly situated; hence, in this case, where it is not

CRIMINAL LAW—*Continued.*

shown that the accused was in actual custody when accused of the commission of a crime, the following charge is not only correct, but extremely liberal to the accused: "standing silent when accused out of court is not presumed as a confession of guilt, but remaining silent when accused of the commission of a crime is a circumstance which, like others, must be considered and weighed by the jury."

State vs. *J. Munston*, 888.

A trial Judge rightfully refuses a question to be put to a witness under cross-examination, to impeach his veracity, unless a foundation has been previously laid to that end. Such witness cannot, in a case of embezzlement, be asked to examine accounts other than those of the accused. Error in such accounts would not prove error in that of the prisoner.

A trial Judge cannot be asked to charge the jury so as to express an opinion as to what facts have been proved. It lies within the exclusive province of the jury to weigh the evidence adduced on the trial.

The failure of an accused to pay over the money which he is charged of having embezzled, if unexplained, does not of itself raise a presumption of a felonious appropriation sufficient to convict.

A bill of exception taken to the overruling of a motion for a new trial, which is levelled exclusively at the verdict, because contrary to the evidence, is devoid of merit, as it presents no question of law which this Court can consider.

State vs. *B. O'Kean*, 901.

Declarations of accused made an hour after the time, and a mile from the place of the homicide, are not admissible as part of *res gestæ*.

The rule that, when confessions or declarations of accused are received on behalf of the State, they must go in all together, applies only to such confessions and statements as are made at one time or in some connection with each other. The admission of confessions of accused does not justify the reception of contrary, self-serving declarations made six weeks previously.

State vs. *W. Johnson*, 968.

Where the trial Judge is requested to give a special charge to the jury, his refusal to do so, although the charge asked is not objectionable, is not error if the charge has been substantially covered by that already delivered by the Judge.

The character of the deceased as a turbulent man may be looked into in determining the amount of provocation, when it tends, in connection with proof of an overt act on the part of the deceased, to

CRIMINAL LAW—*Continued.*

produce in the mind of the slayer a reasonable belief of imminent danger.

The right of self-defence does not depend exclusively upon the reality or imminency of the danger apprehended, but whether at the time the accused had reasonable ground to believe himself in danger of losing his life or of great bodily harm, and had no other apparent means of escape than to take the life of his adversary, and whether such grounds existed, is a fact for the determination of the jury.

The trial Judge is not bound to charge on a particular point of law, although the charge may announce a correct legal principle, where, in the exercise of a sound discretion, he is satisfied that such charge is not applicable to the case.

Evidence of the good character of the accused is admissible in his behalf, and is not to be limited in its effect to merely doubtful cases, but to be weighed as any other fact in the case, and as one tending in a greater or less degree to establish the innocence of the accused.

State vs. *Garig et al.*, 970.

Testimony offered to show that a co-defendant, in a case of larceny, and a fugitive from justice, called upon and induced the prisoner to assist him to go after the property stolen, is not *hearsay*, but original evidence. The facts sought to be proved form part of the *res gestæ*, and were susceptible of legal proof.

State vs. *Chretien*, 1031.

An accomplice may be called as a witness for the State, even when jointly indicted with said accused and before his own conviction or acquittal, where the trials are separate.

The Judge is not bound to give a charge, although it may be correct as an abstract principle of law, where, in his belief, there is no fact proved to which it is pertinent.

State vs. *L. Hamilton*, 1043.

Oral testimony is admissible to prove the contents of a dying declaration, *first* proved to have been lost.

State vs. *Rector*, 1098.

The fact that one witness is not allowed to prove a confession made to him by an accused, because inducements had been held out by that witness, will not be good ground to exclude a confession made by the same accused a short time thereafter, to another witness, who had made no threats or held out no inducements in order to draw out the confession.

CRIMINAL LAW—*Continued.*

In cross-examining a witness for the defense, the State will be allowed to propound questions growing out of facts and circumstances stated in his direct examination by the witness, even when it appears that the witness had been introduced for a different and exclusive purpose.

State vs. *R. Stuart*, 1015.

FORGERY.

It is not necessary, to support a prosecution for forgery or falsely uttering, that the instrument purporting to be forged should be perfect in its resemblance to the kind it was designed to represent. It is sufficient that it was calculated to deceive.

Thus an order addressed to a merchant in these words: "Please let George have sixteen dollars worth, and charge the same to Mr. George Garrett;" held sufficient.

State vs. *R. Ferguson*, 1042.

INDICTMENT.

Where a party is indicted for murder, and convicted of manslaughter, the indictment, if filed within the year the killing took place, interrupts prescription for the latter offense.

State vs. *M. Diskin*, 46.

An indictment is not vicious for duplicity because two distinct offences are charged therein, provided they be in separate counts, nor is it even necessary that they be of the same class of offences if charged in separate counts.

The Judge can direct a jury to reconsider their verdict, before it is recorded, if satisfied that a palpable mistake has been made, provided in so doing there is no attempt to influence the jury, or to direct them beyond aiding them to put in form what they have found.

A conviction of a less offence than that charged in the indictment, both being of the same generic class, is expressly authorized by our law. And therefore a conviction of inflicting a wound less than mayhem with a dangerous weapon or with intent to kill, denounced as a crime by Sec. 974, Rev. Stats., is legal and regular under an indictment for cutting with a dangerous weapon with intent to commit murder, under Sec. 791.

State vs. *L. Gilkie*, 53.

Where a party is indicted as E. Buchanan, is arraigned and pleads as Amos Buchanan, which is his true name, the State during the progress of the trial can amend the indictment by setting out the true name.

State vs. *A. Buchanan*, 89.

CRIMINAL LAW—*Continued.*

An instrument which reads as follows: "December 23d, 1882. Bleas let James Johnson have ten dollars worth of dry goods, $10, and send the Bill, J. DILLINGER," which is transcribed in full in an indictment for forgery, supported by proper averments, is an order sufficient to sustain a prosecution and to justify a verdict.

A clerical error in writing a name in an indictment cannot be invoked as vitiating the proceeding. State vs. Given, 32 An. 782.

State vs. *W. Morgan*, 293.

When the venue has been changed, the indictment must be transmitted to the court to which the cause has been removed, and does not need to have stamped upon it the seal of the court from which it comes. If a trial is had and the judgment is set aside, the indictment remains in the court where the trial was had, and no more needs the seal of either court for the second trial than for the first. The new forum stands in the place of that in which the indictment was found, and as it would not need a seal if the trial had taken place in the latter court, so it does not in the other. The minutes of the court, its orders, etc., cannot be sent up, and therefore must be copied, and the copy attested by a seal.

Counsel should not be permitted to re-argue the question after the court has decided it. Their remedy is by exception to the ruling.

State vs. *H. J. Brown*, 340.

An indictment for burglary is not bad for duplicity because it charges the offense of breaking and entering with intent to steal and rob, and that of breaking and entering with intent to kill and murder. 34 An. 48; 30 An. 487, reaffirmed.

State vs. *J. Conway*, 350.

Under an indictment for shooting with intent to murder, a verdict of "inflicting with a dangerous weapon a wound less than mayhem," is fatally variant.

The two offenses are separate and distinct crimes which could not be joined in the same count of an indictment.

The offense found is not necessarily embraced within that charged.

State vs. *A. R. Murdoch*, 729.

Section 119, Revised Statutes, is a penal but not a criminal statute.

An attorney-at-law falls within the category of persons named in Sec. 905, Rev. Stats., and is sufficiently described in an indictment as an attorney.

An attorney who has wrongfully used or disposed of money collected for his principal may be convicted of embezzlement, even though he acknowledged its receipt.

State vs. *R. L. Belden*, 823.

CRIMINAL LAW—*Continued.*

An indictment charging that the accused with a dangerous weapon did *make an assault* upon the person of A, and did feloniously inflict a wound less than mayhem, is evidently framed under Sec. 974 of the R. S.

It is not amenable to the charge of duplicity, for containing the words: "*did make an assault*," found in the preceding Section 973.

Assault is an essential element or ingredient of the offense charged. There can be no battery, no murder, no rape, no wounding, unless an assault be first committed.

The use of the words did not change the nature of the offense charged, and was legitimate and authorized.

State vs. *W. Taylor*, 835.

Indictment concluding with the words "against the peace and dignity of the State," complies with requirement of Art. 86 of the Constitution.

As to distinction between day and night, time is of essence of the crime of burglary, but not as to date of week, month or year; and the court did not err in allowing amendment of indictment as to such date, under § 1047, Rev. Stat.

State vs. *J. Johnson et al.*, 842.

An indictment for forgery containing the purport or tenor of the instrument said to have been forged, and setting forth the words of such instrument, can be legally amended during the trial, by substituting the word *oblige* to the word *charge* at the conclusion thereof.

The variance was not material and could not prejudice the defense.

The correction was trivial and left the sound and sense substantially the same.

State vs. *D. Sullivan*, 844.

An indictment framed in compliance with the provisions of Section 1048, Revised Statutes, need not state the means by which death was inflicted, and need not comply with the common law forms of indictments. State vs. Bartley, 34 An. 147; State vs. Granville, 34 An. 1088, reaffirmed.

State vs. *J. Munston*, 888.

Where the property stolen was a piece of meat and was charged in the indictment to be the property of A, and the proof was that B, who was the seller of it, had cut it off a larger piece and had put it on the counter, and A paid for it, and it was stolen before A took it up; *held*, the delivery was complete; the property was rightfully laid in A, and the conviction was legal.

State vs. *J. Robinson*, 964.

Sec. 790, Rev. Stats., denounces as a crime the shooting, etc., any person

CRIMINAL LAW--*Continued.*

with murderous intent, whether done while lying in wait, or while perpetrating arson, etc. The circumstances under which the shooting was done may be either those of lying in wait, or perpetrating other named crimes, and an indictment charging the shooting under either will be good.

An error in date of the term of court at which the indictment was found may be corrected with leave of the court.

The insertion in the indictment of the words "with a dangerous weapon" is not essential, where all the ingredients of the crime that are set out, necessarily imply the use of a dangerous weapon.

State vs. *A. Humphries*, 766.

The Judge does not err in refusing to give to the jury a charge, however legal, which is evidently covered by previous charges. Such charge is unnecessary.

Sentence can be legally passed on a conviction of guilt of *larceny*, although the indictment was for *burglary* and *larceny* and the verdict was on *both*, and the indictment, fatally defective on the count for *burglary*, was, with the verdict, to that extent quashed on a motion in arrest.

The indictment and verdict on the charge of *larceny*, which is an offense not necessarily connected, remained perfect and were a good foundation for the sentence.

State vs. *T. Brown*, 1058.

The authentication of the clerk to the copy of an indictment extends to the body of the instrument, and to the indorsement thereon, where both are in the hands of the attesting deputy.

State vs. *Rector*, 1098.

An amendment allowed during trial, in a case of rape, substituting a different name to that of the person charged as having been ravished, with the object of substituting another person, affects the substance of the indictment and is not permissible under Sec. 1047, R. S. The District Court was right after verdict to quash the same.

State vs. *M. Morgan*, 1139.

A trial Judge is justified in refusing to give to the jury special charges which, although legal and pertinent, are amply covered by charges previously given.

It is unnecessary, in an indictment under Sec. 832, R. S., charging, in the words of the Statute, that the accused has feloniously received the object which had been feloniously stolen, he well knowing that the same had been so feloniously stolen and taken, to charge specially that the offense was committed with intent to defraud

CRIMINAL LAW—*Continued.*

the owner of the property, or some person, or for the purpose of felonious or wicked gain.

State vs. *F. Hartleb*, 1180.

INFORMATION.

In an information for an assault with a dangerous weapon with intent to murder, the words "make an assault," are not sacramental. The word "commit" may be used instead of "make," where the facts are averred that make up the offense charged. The word "commit," in such connection, does not merely declare a conclusion or opinion.

Where the charge of the assault is followed by the words, "with intent *in so doing*, feloniously, wilfully and of his malice aforethought, to kill and murder," the words "in so doing," supply the place of "then and there," as they sufficiently show that the intent charged accompanied the assault.

State R. Murphy, 622.

An information that charges, "that A. B. at 8 o'clock in the night time with the felonious intent, the dwelling house of one C. D. feloniously then and there to set fire to and burn, feloniously and burglariously then and there did break and enter the said dwelling house," is not obnoxious to the charge of duplicity, as it charges but one offense, and that offense declared by Sec. 851, Rev. Stat.

State M. Ely et al., 895.

JURY.

A clerk of a District Court, elected in December, 1879, who took an oath of office as clerk on the 21st of January, 1880, and who took an oath as *ex-officio* jury commissioner on March 6th, 1880, complied with the requirements of the Constitution, of the law and of jurisprudence; and was thus legally qualified as far as the prescribed oath was concerned as a jury commissioner. No other oath was required of him on entering into his office on the 1st Monday of April, 1880.

State vs. *James Fahey*, 9.

Act 44 of 1877, relative to jury commissioners, was not repealed by the Constitution, with which it was not inconsistent. If Act 54 of 1880, on the same subject, was not passed in furtherance of Article 116 of the Constitution, the former Act was in force at the time of the trial of this case. If it was, as it continued Act No. 44, under which the commissioners were appointed, there is no cause of complaint.

CRIMINAL LAW—*Continued.*

It is no valid objection that the selection of jurors was not made from all *qualified* voters, but from the *registered* voters, when it is not shown that the list of the latter did not contain the names of all the former.

That the accused was manacled, while a motion for a new trial was being tried, is no ground for a motion in arrest of judgment, which reaches only intrinsic errors patent on the face of the record and which vitiate the proceedings.

A proceeding to falsify the judgment can be entertained on a proper showing. That a petit juror was a member of the grand jury who found the bill, should be urged by challenge at the proper time, and cannot avail on a motion in arrest.

State vs. *Frank Thomas*, 24.

Under the provisions of Act 44 of 1877, the District Judge has the discretionary power to order the drawing of additional jurors to serve as regular or as talesman jurors; and under the same authority he has the power to discharge the jurors so drawn, if he thinks that their services are no longer necessary.

State vs. *Robert West*, 28.

Where a juror, when examined on his *voir dire*, declares that he has formed no opinion touching the guilt of the accused, that he knows nothing of the case, his competency thus shown will not be affected by proof of an inconsiderate remark, uttered a short time before he was called as a juror, and which, without explanation, might seem to denote a bias against the accused.

State vs. *M. Diskin*, 46.

Art. 117 of the Constitution and Act 77 of 1880, contain nothing inconsistent with previously existing laws authorizing District Judges to call special jury terms; and the latter, therefore, are not repealed.

Where, in calling such a term, the Judge has complied with all the duties imposed on him by the law, the partial failure by the clerk to perform all the duties imposed on him, with reference to giving notice, will not invalidate the term, under the circumstances disclosed in this case.

Where the Judge was appointed to fill a vacancy during the recess of the senate, and then appoints jury commissioners, his subsequent confirmation by the senate and taking a new oath, does not create such a new term as vacates the offices of the jury commissioners and requires a new appointment.

CRIMINAL LAW—*Continued.*

Act 44 of 1877 conferring on clerks the *ex-officio* duty of acting as jury commissioners, is not repealed by Art. 122 of the Constitution, or Acts 106 of 1880 and 43 of 1882.

State vs. *A. Claude et al.*, 71.

The Jury Act of 1877 is in force, and was in no manner repealed or affected by the new Constitution.

A motion in arrest, on the ground that there is no law for the selection and composition of juries by reason of the alleged repeal of all statutes on that subject, is in substance a challenge to the array, and must be made before pleading to the indictment. The objection comes too late in a motion for arrest of judgment.

State vs. *C. White*, 96.

Where, after a criminal case is taken up for trial and the jury is being impanelled, the regular venire is exhausted, the trial Judge is authorized to order the summoning of talesmen from bystanders in the courthouse and in proximity thereto. And where the sheriff summons a talesman from the bystanders in the vicinity of the courthouse and nearest thereto after the court has adjourned, on the day and on the next morning thereafter, before the court resumes its session, the summons is regular, and the juror, if not otherwise disqualified, competent.

Where the juror, examined on his *voir dire*, says he has no fixed opinion touching the guilt or innocence of the accused, and no bias or prejudice against him, he is competent, though he may previously have had an opinion or impression on the subject, where it appears that such opinion or impression will yield to the evidence in the case.

State vs. *H. Revells*, 302.

Attachments against absent jurors cannot be required to be issued where there is a sufficient number of jurors present to form the panel, or when there are only four absent, and they reside twenty-five miles from the courthouse, or when the motion is not made before going to trial.

State vs. *M. Farrer*, 315.

Juror who states, on his *voir dire*, that he has formed and expressed an opinion as to guilt or innocence of the accused, which opinion was based on statements made by witnesses in the case, but that this opinion would yield to sworn evidence, and would have no influence on him in the jury box, and that he was free of bias or prejudice against or in favor of the accused, whom he would try impartially, is a competent juror.

State vs. *R. Dugay*, 327.

CRIMINAL LAW—*Continued.*

The State has the right to ascertain the fact of a juror's fitness and impartiality by other than the stereotyped questions on the *voir dire*, and may interrogate the juror in such manner and form as will best serve to show whether the juror has been subjected, knowingly or not, to influences that would unfit him for the discharge of his function.

State vs. *H. J. Brown*, 340.

Under Act No. 44 of 1877, regulating the manner of drawing juries in this State, the clerk is the most responsible, and is an essential and indispensable member of the jury commission. Hence, no jury can be legally drawn during his absence and without his co-operation.

State vs. *J. Conway*, 350.

The minutes of court do not contain properly the recital of service of the list of jurors on the prisoner, and therefore an objection, not that there was no service, but that the minutes do not show it, is untenable. The sheriff's return is the place where such service is shown.

State vs. *H. G. Blackman*, 483,

Where jury commissioners accept a number of names found in the venire box, selected by their predecessors, after due examination into their competency and qualifications as jurors, and add to these names others to make up the prescribed number, the law is substantially complied with, and the drawing and the selection of the venire is not vitiated.

Where a juror has been examined on his *voir dire* by counsel for the State and the accused, and the Judge has ruled that he was competent, it is too late for the counsel for the accused to reopen the examination upon the matter of his competency; and the further fact that the person objected to did not serve on the jury, leaves the accused without the least ground of complaint.

State vs. *R. Mangrum*, 619.

The trial Judge has the right to take judicial notice of the existence before his court of a prosecution for an infamous crime against one called on to serve as a juror, and is authorized to exclude him from service.

State vs. *P. Jackson*, 769.

Where three hundred names of jurors have been put in the box from which the jury has been drawn for the first weeks of the term, it is not necessary to revise the list and put in more names to draw a jury for a later week of the same term.

The list of jurors served on the prisoner need not be a copy of the

CRIMINAL LAW—*Continued.*

proces verbal of the drawing. It is only needful that the list be complete and correct.

The omission of the word "foreman" from the signature on the back of an indictment is not fatal. It is sufficient that the foreman has signed his name to the finding of the jury, "a true bill," without mentioning his capacity.

The objection that a juror is an unnaturalized foreigner must be made as a challenge, when he is presented, and cannot be urged in arrest of judgment.

State vs. *C. Sopher*, 976.

If it appears in a criminal case, from the indictment or other portions of the record, that the grand jury had been duly empanelled and sworn, and otherwise legally organized, it is sufficient. The minutes of the court are not the exclusive mode of proving such facts.

State vs. *R. Stuart*, 1015.

An objection made to the time of drawing the jury, without charging fraud or wrong, as required by Section 10 of Act 44 of 1877, cannot be considered.

The Statute, R. S. 992, does not expressly say: that the list of jurors to be served on the accused shall be attested by the clerk under his official signature. Where the list issued, and admitted to have been served, is a newspaper clipping, which bears the impress of the seal of the court, and which ends with the words: *a true copy*, followed by the printed name of the deputy clerk; where no complaint is made that the list is otherwise defective; where the list is truly an exact copy of the original, and where there is no injury shown, substantial compliance with the law cannot be denied.

The looseness with which the documents were issued by the clerk is censurable.

State vs. *Rector*, 1098.

Mere temporary absence from the State, during the year prior to the service of a juror, if without the intention of changing citizenship or abandoning residence, will not destroy the qualifications of a juror.

State vs. *J. Alexander*, 1100.

LARCENY.

In petty larceny there can be no accessory. Those who in grand larceny would be accessories before the fact, under our statute are principals in petty larceny. Hence, the following charge to the jury in a case of petty larceny is correct: When a person hires another to commit a theft, and for that reason the theft is committed by the person thus hired, and the person hiring for the com-

CRIMINAL LAW—*Continued.*

mission thereof enjoys the benefit of the theft, such person is guilty of larceny, although absent at the time the theft is committed.

State vs. *J. Henderson et al.*, 45.

MOTION IN ARREST.

A motion in arrest of judgment is not the proper proceeding to reach a variance between allegation and proof said to exist in an information. Such a motion can be directed only against defects or intrinsic causes apparent on the face of the record, which vitiate the proceeding.

State vs. *G. Frey*, 106.

NEW TRIAL.

A new trial will not be granted on the ground of newly discovered evidence, where such evidence is designed merely to impeach the credibility of witnesses for the State, who testified at the trial, or, if it consists of rebutting evidence, still the new trial will not be allowed unless such evidence is sufficient to change the result, and could not by due diligence have been obtained at the trial.

State vs. *M. Diskin*, 46.

A new trial will not be granted by the Supreme Court unless it appear that injustice had been done. A large discretion is entrusted to the lower court in the matter of granting new trials, which will not be interfered with except for grave reasons. If the ground for a new trial be the insufficiency of the evidence to convict, the Supreme Court will not consider it, that being a question for the jury alone and exclusively.

The Judge has a right to order the jury to reconsider its verdict when a palpable mistake has been made, such as finding the prisoner guilty of an offense not known to our law. It is his duty to exhibit the mistake to them, and to explain the different verdicts they may find under the indictment.

State vs. *C. White*, 96.

Although a District Judge has improperly excluded jurors, the error is not such as entitles the defendant to a reversal of the verdict and sentence, and to a remanding of the case for a new trial, where it does not appear that the accused had exhausted his peremptory challenges before the jury was fully made up and did not obtain an entire panel of his own choice and an impartial trial.

State vs. *M. Farrer*, 315.

The complaint that the Judge in a criminal case has improperly overruled a motion for a new trial will not be considered when not presented in a bill of exceptions.

State vs. *J. Williams*, 742.

CRIMINAL LAW—*Continued.*

Where the ruling of the court, refusing a new trial, although it be of record and accompanied by the evidence heard, is not excepted to, a bill of exception taken to the admission of testimony, on the trial of the motion, will not be considered by this Court.

State vs. *P. Jackson*, 769.

This Court will not review the ruling of the Judge on a motion for a new trial, on the ground of newly discovered evidence, in absence of a bill of exceptions bringing up the ruling and the evidence. 32 An. 842.

State vs. *R. L. Belden*, 823.

Where the record of a criminal case contains nothing upon which the Supreme Court can act, the judgment is necessarily affirmed.

A motion for a new trial on the ground that evidence, of which the defendant knew, was more important than he had supposed, was properly overruled.

State vs. *J. Anderson*, 991.

TRIAL.

The presence of the accused in court when the verdict of the jury is received, on a trial for a felony, cannot be dispensed with, and the record must show that fact affirmatively.

State vs. *S. Johnson*, 208.

The postponement of a criminal trial to the next day after that on which it is set, although it may occasion inconvenience to the counsel and expense to the parish, will not of itself prejudice the prisoner's rights, nor will the fact that a civil cause is put aside, in order to take up the criminal trial, affect the regularity or legality of the conviction.

State vs. *H. J. Brown*, 340.

A mistrial and consequent discharge of the jury is not a bar to a second trial on the same indictment. The prisoner was not legally put in jeopardy on the first trial. The discharge of the jury on the first trial was within the sound discretion of the court.

State vs. *H. G. Blackman*, 483.

The refusal of the Judge to deliver his charge to the jury in writing upon the seasonable request of the party, as required by statute, is error, and justifies the avoidance of the sentence and judgment.

State vs. *Porter et al.*, 535.

The employment of private counsel, and his assistance of the District Attorney in his prosecution of the offense, is not sufficient to set aside the verdict. Decision in State vs. Gus. Anderson, 29 An. 774, reaffirmed.

State vs. *R. Mangrum*, 619.

CRIMINAL LAW—*Continued.*

In cases not capital, the trial court may in its discretion allow the jury to separate before the submission of the cause.

But in such cases, as well as in capital cases, the proceedings will be vitiated if a deputy sheriff, having charge of the jury, makes in their hearing statements of a damaging character to the accused, and if, in answer to a question of a juror, he informs him that the accused had been previously sentenced to the penitentiary for the commission of a heinous offense.

State vs. *J. Dallas*, 899.

In criminal practice no rule compels the trial Judge to charge the jury in the identical terms and language suggested by counsel for the accused. A charge embodying substantially the principle invoked by the accused, and containing a correct exposition of the law regulating the point involved, is sufficient and will be maintained by the Supreme Court. The following charge was properly refused in a criminal trial, as being argumentative and involving nice distinction in metaphysics, which it is not the province of the court to expound to a jury:

"In cases of wanton cruelty, the presumption is always against the State, for no man is cruel without some interest, without some motive of fear or hate."

State vs. *Porter et al.*, 1159.

VERDICT.

It is not every irregularity in the proceedings, or error in the instructions of the Judge, that vitiates a verdict or sentence, but it must be an irregularity that deprives the accused of some substantial right or protection, and an error so grave as to justify a belief that, but for its commission, a different and more favorable result to the accused would have been reached.

State vs. *Garic et al.*, 970.

The excusing of a tales juror by the Judge, although not legally exempt, and although the accused may have at the time exhausted his peremptory challenges, is not sufficient to vitiate the verdict.

State vs. *L. Hamilton*, 1043.

Where a part of the charge of the Judge to the jury is objected to, but it appears that the same has no bearing on the question of the guilt or innocence of the accused, and can in no manner prejudice him, whether correct or not, it will not be considered by this Court as affording any ground of relief from the verdict and sentence.

State vs. *Turner et al.*, 1103.

DAMAGES.

When a boy is shot intentionally or carelessly by another boy with a shot gun loaded with powder and fired off on one of the streets of New Orleans, the father of the boy who discharged the gun is liable for damages for the injury inflicted and suffering caused thereby.

The boy shot did not contribute to his own injury and excuse the fault of the other, because he would not or could not get out of the way when ordered by the boy shooting to do so.

Marionneaux, Tutrix, vs. *F. Brugier,* 13.

A degree of attention, beyond that given to an ordinary passenger, should be bestowed on one known to be affected by a disability, by which the hazards of travel are increased.

It is the duty of a street car driver to give passengers a reasonable opportunity to alight.

Where he does not stop a sufficient time, and starts before the passenger has stepped off, it is negligence.

For injury sustained, not only actual, but prospective damages should be allowed approximatively, in the exercise of a sound discretion. In such a case the liability of the Company is indubitable.

Mrs. Wardle vs. *City R. R. Co.,* 202.

As a general rule in action of damages, the damages should be estimated and assessed according to the condition of affairs existing before and up to the time of the institution of the suit, and a party is not entitled to recover expenses incurred for fees of counsel and expenses of attending the trial and for loss of time during the pendency of the suit, at least, without an amendment to the pleadings seasonably made, presenting such charges.

W. S. Campbell vs. *J. P. Short,* 465.

Where a person seizes and sells the property of one for the debt of another, but the proceeding, though unwarranted, is not wanton or malicious, the party seizing cannot be held for punitive or vindictive damages.

L. Kee & Co. vs. *Smith Bros. & Co.,* 518.

In a suit for damages because of a criminal prosecution, where the only witness of the plaintiff is himself, who admits there has been no loss of his business, exhibits an insignificant expenditure, and displays insensibility, a verdict for a small sum will be considered sufficiently punitory of the defendant.

J. Mailhe vs. *L. Lacassagne,* 594.

In an action for damages alleged to have been caused to plaintiff's property by the running of a railroad company's trains, which are

DAMAGES—*Continued.*

alleged to injure his property and to be a nuisance, by jarring and shaking his house, by making insupportable noises and emitting noxious smells and smoke, prescription cannot avail as a means of defense, because the acts charged are continuous, and because the causes and effects are renewed *de die in diem.*

When the petition charges that the defendant is doing certain acts, such as running trains through certain streets of a city, without warrant of law or sanction of authority, the defendant, under the plea of general denial, will be allowed to introduce in evidence private acts of the legislature and city ordinances purporting to authorize the acts complained of. As such acts are introduced for the purpose of rebutting the assertion of illegality, they need not be specially pleaded.

The legislature has the power to authorize the building of a railroad, using steam engines on a street of a city, provided the road be so constructed as not to exclude the public from any part of the street.

A railroad company which has laid a track on a street in a city, and runs steam trains thereon, under such authority, and with a substantial compliance with city ordinances regulating such use of the street, is entitled to the protection of the law which exonerates a party in pursuit of a legal right from any responsibility for damages, not shown to have resulted from his gross carelessness or culpable negligence.

Contraventions of city ordinances by the railroad company cannot be a cause of action by private parties, unless they allege and show damages resulting therefrom. The power to correct such abuses is vested in the city under its police power.

In an action for damages, the nuisance charged must be proved to be the legitimate result of the alleged cause, and not the result of other artificial causes.

In case of doubt the benefit thereof must be given to the defendant, if his trade is a lawful one.

Mrs. Werges vs. *R. R. Co.*, 641.

A railroad company is responsible for cattle killed by its trains, through the negligence and carelessness of its employees. Stevenson vs. N. O. Pacific R. R., affirmed.

The failure of a railroad company to introduce the testimony of its employees, who were on the train at the time of the accident, raises a presumption of negligence against the company.

DAMAGES—*Continued.*

Attorney's fees incurred in the prosecution of a suit for damages cannot be allowed in the same suit.

Mrs. Day and Husband vs. *R. R. Co.*, 695.

A master is responsible to his employee for damages caused to him by an incompetent fellow-servant.

Notice to the employer of such incompetence, and promise on his part to remove the incompetent fellow-servant, are not indispensable on the part of the injured employee, whose services are hired for a limited time, and who has a right to perform his contract and require his pay.

Laborers, who hire themselves out to serve on plantations, have not the right of leaving the person who has hired them, nor can they be sent away by the proprietor, until the term of their engagement has expired, unless for good and just cause.

The responsibility attaches, undoubtedly, where there is shown a formal notice and an express promise to change, and when a failure to remove and consequent injury resulting therefrom are established. The promise need not be explicit.

Where the verdict of a jury allows disproportionate damages, the allowance will be reduced by the appellate court.

M. A. Poirier, etc., vs. *D. R. Carroll*, 699.

A tramway, which occasions injury because its rail is out of place, is not protected from liability for damages by reason of the permission of the city to operate its road.

P. Dominguez vs. *R. R. Co.*, 751.

Proof of title, in an action for damages against a mere trespasser, is not required to be as complete and satisfactory as that required in a petitory action for the recovery of the land.

When the trespass is not wilful but the result of mere inadvertence, the value of the timber when first cut is the measure of damages.

Gardere vs. *Blanton et al.*, 811.

One who permits a railroad company to occupy and use his land and construct its road thereon, without remonstrance or complaint, cannot afterwards reclaim it free from the servitude he has permitted to be imposed upon it. His acquiescence in the company's taking possession and constructing its works under circumstances which made imperative his resistance, if he ever intended to set up illegality, will be considered a waiver. But while this presumed waiver is a bar to his action to dispossess the company, he is not deprived of his action for damages for the value of the land, or for injuries done him by the construction or operation of the road.

St. Julien vs. *R. R. Co.*, 924.

DAMAGES—*Continued.*

A person cannot treat a railroad's entry upon his land as tortious after he has by conduct acquiesced in it, and stood silently by until it was accomplished, and the road bed was equipped with ties and rails.

But a railroad company must not so construct its road as to inflict injury upon the proprietor of land over which it passes. It is liable in damages for injuries to the land occasioned by closing ditches and obstructing drains, whereby water is impeded or obstructed in its passage, and the crops are thus injured or destroyed.

The liability of a railroad company is substantially the same as that of an individual for torts or actionable injuries occasioned by its improper or defective construction, and for obstructions created by it to the natural flow of water, whereby adjacent land is injured in its cultivation.

Bourdier & Bellesein vs. *R. R. Co.*, 947.

Where, under a written contract, and for a valuable consideration, plaintiff acquired the privilege of erecting a sawmill on defendant's land and cutting and sawing timber therefrom, and before the expiration of the time allowed by the contract, his son in charge and his employees are driven from the place by violence, and plaintiff compelled to remove the mill, the jury, in estimating the damages, are not limited to the actual pecuniary loss resulting from a breach of the contract, but may treat the mode of its violation as an offense, and award damages therefor.

The wrong to the plaintiff was not less personal because the violence was used upon his employees, than if directed against himself. In such cases much discretion is left to the jury in assessing the damages.

W. Enders vs. *J. A. Skannal*, 1000.

A railway company is responsible for the damages occasioned by its failure to make road crossings.

When the right of way is granted on the expressed condition of making such crossings, and with the stipulation to that effect, the company will be held to the performance of its contract, and mulcted for its violation.

Attorney's fees are not recoverable in an action for damages when the act complained of is not tainted by fraud or malice.

D. Eatman vs. *R. R. Co.*, 1018.

The rule of our law, as well as of the common law, is, that he who owns and keeps a dangerous animal knowing it to be such, is bound, at his peril, to keep him up safe from hurting innocent persons, and if, for want of sufficient care, the animal escape and do injury, the owner is liable.

DAMAGES—*Continued.*

The *scienter* may be established by attendant circumstances without necessity, in all cases, of proving prior cases of injury.

Montgomery, Gullifer, Subrogee, vs. *G. H. Koester,* 1091.

The law is not, if a party threatens another with the commission of a wrong, unless he does an act which he is not obliged to do, that such party has a right to commit the wrong, and that the injured party cannot recover damages.

The authorities agree that, after a wrong has been committed, the damaged party shall not increase it, and that, if he does, he shall have no right to complain for loss or injury sustained in consequence of his wilful acts of commission or omission.

Damages can be recovered from an officer, although apparently acting in the discharge of official functions, for the execution of an order of his, which was unauthorized, arbitrary and wrongful.

The President of a Board of Health, ordering the fumigation of a vessel carrying a cargo of fruit, is personally answerable in damages where he thus acts under his declared personal responsibility, without authority from law or the Board, and arbitrarily; and where the cargo was in consequence damaged.

Where witnesses, who belong to the same trade and business, testify as to the value of articles within their line, the safe rule is to allow the lowest estimate.

W. S. Beers vs. *Board of Health et als.,* 1132.

In absence of proof of fault or negligence in the employment of incompetent or careless servants, an employer is not responsible for damages resulting to one servant from the fault or negligence of another. Upon the facts and circumstances disclosed by the evidence, plaintiff's claim for damages cannot be sustained.

C. Satterly vs. *C. Morgan,* 1166.

DEDICATION.

In a suit to recover a lot of land by purchasers from one who had donated the land to the defendant on the grounds:

That the act had not been accepted by the proper party; that the conditions of the donation had not been complied with, and the act had not been properly recorded, *held:*

That the donee was the Police Jury of the Parish of Jefferson, Right Bank; that the formal acceptance of the President of this body and the taking possession of the property and its continuous use by the donee, was a complete acceptance; that the building of a jail for the confinement of prisoners arrested in the parish fulfilled the condition of the act, which was that the property should be used for parish purposes; that the omission to register the renun-

DEDICATION—*Continued.*

ciation of the wife of the donor accompanying the donation did not invalidate the registry of the donation.

C. H. Lawrence et al. vs. *Police Jury, etc.*, 601.

DONATION.

They who have lived together in open concubinage are respectively incapable of making to each other a donation, either *inter vivos* or *mortis causa*, of movables exceeding one-tenth in value of their estate. A will, by which the whole estate of the concubine is given to her paramour, will be reduced, on application of her legitimate son, to one-tenth.

Succession of H. C. Hamilton, 640.

An act in which a party stipulates to make a donation *inter vivos* to a married woman, of a part interest of the donor's claim to lands left by his and the donee's common ancestor, on condition that the donee's husband shall undertake, at his exclusive trouble and expense, the recovery of all the lands claimed under the common ancestor, with the stipulation that the donee will be put in possession as soon as the donor is recognized as the owner of the lands, is really and in law a contract of mandate under which the husband agrees to take the steps necessary to the recovery of the lands, accepting as his compensation, in case of success, a part interest in said lands to enure to the benefit of his wife.

His wife and her heirs cannot recover from the so-called donor, if her husband failed to execute the suspensive condition of his contract. The nullity of such contract, as a consequence of the failure of the suspensive condition, can be urged as a means of defense by the donor or his heirs.

Widow Bouligny vs. *Janin et als.*, 748.

DUE PROCESS OF LAW.

It is now the settled jurisprudence of the Supreme Court of the United States that, except in actions affecting personal *status*, or in those partaking of the nature of proceedings *in rem*, like suits to partition real estate, foreclose mortgages or enforce privileges or liens, substituted service, as against a non-resident, can be effectual as "due process of law," under the 14th Amendment to the Constitution of the United States, only where, in connection therewith, property in the State is brought under the control of the court and is subjected to its disposition by process adapted to that purpose. The question being federal in its nature, former jurisprudence of this Court on this subject must yield to the authority of the Supreme Court of the United States.

J. Laughlin vs. *Ice Co.*, 1184.

ESTOPPEL.

The judicial declaration by the president of a bank, that a certain note is the property of his bank, will estop the same party from subsequently claiming that he was then the owner of the same note.

L. Folger vs. *E. C. Palmer*, 743.

EVIDENCE.

The authentic act of the ancestor cannot be attacked or contradicted on grounds of simulation or fraud, by simple heirs, but only by *forced heirs*, who, in order to be heard, must sue *as* forced heirs, and must allege and prove that the transaction attacked impairs their *légitime*, and that its annulment is essential for the enforcement thereof.

Boone et al., Executors, vs. *M. Carroll*, 281.

The record of a suit in another State is admissible in evidence to prove *rem ipsam*, but is inadmissible to establish the status of one not a party thereto or privy. The judgment rendered in such suit is not conclusive on those who had no notice, either actual or constructive, of the proceedings, and who made no appearance therein.

The depositions of witnesses, relating to pedigree, taken in this State to be read in evidence in another State, can be used as evidence in a subsequent suit in this State between different parties, when it is admitted that the witnesses are dead, and the testimony is offered for the sole purpose of proving pedigree.

Succession of J. A. Lampton, 418.

In a contract for the delivery of coal by one of the contracting parties to the other, within a given time, and the contract is silent as to the quantity, parol evidence is admissible to show the real intention of the parties in this respect and to explain its meaning.

W. S. Campbell vs. *J. P. Short*, 447.

Oral testimony is inadmissible between the parties to a written contract to show simulation. This can be done only by a counter letter, or written evidence amounting thereto. Conversations or understandings anterior to the date of the instrument attacked are presumed to be included in it. The rule applies to all written acts, whether they relate to immovables or to movables. The unbending jurisprudence of this State does not allow a party to vary or destroy his own voluntary declarations or written agreements by anything short of written evidence.

The rule is not binding on third parties. Oral testimony may be admissible, however, between the parties to prove a new and subsequent agreement as regards some part of the previous one.

The oral testimony received to show simulation of an act of dissolution

EVIDENCE—*Continued.*

of a partnership and a sale by one partner of his interest therein to another, should have been rejected.

G. W. Cary vs. *J. P. Richardson*, 505.

Parol testimony is admissible to prove a mistake in the description of lands set out in a deed of conveyance, where error is alleged, and even to show that a tract of land described therein was not sold, or intended to be conveyed by the deed.

J. E. Vignie vs. *Brady et al.*, 560.

Where a person's home was in this city, where his mother and nearest relatives also resided, and he left his home during the late war and joined the army, never returned and never was heard of afterwards, the lapse of time and absence under said circumstances are sufficient to create the presumption of his death.

Mrs. A. Jamison vs. *P. Smith*, 609.

Stale claims, long withheld from prosecution or presentation, are regarded with disfavor.

Extra-judicial admissions of a dead man are the weakest of all evidence, since they cannot be contradicted, and no fear of detection in false swearing impends over the witness.

The evidence of a claim that has long been delayed in its prosecution, when no hindrance was in the way, must be more conclusive than in ordinary circumstances. It must be established with more than reasonable certainty.

Bodenheimer vs. *Bodenheimer*, 1005.

EXECUTORS.

An executor residing out of the State, and who, coming here, represents himself as a resident and is recognized by the court as executor and as entitled to act as such, cannot claim that he was recognized as a domiciled executor and is exempt from bond, where he does not clearly establish that at the time he had changed his domicile.

Non-resident executors are not requested to take an oath, having already been sworn. The taking of an oath as executor here is a superfluity, and does not qualify them. The giving of the bond alone does.

Where there are two executors, and one qualifies and the other does not, the entire commission accrues to the one who has qualified. 25 An. 320, affirmed.

Succession of Bodenheimer, 1034.

EXECUTORY PROCESS.

One claiming to be the lessee of real estate, ordered to be seized and

EXECUTORY PROCESS—*Continued.*

sold, has no standing in court to arrest the sale and annul the order for executory proceedings. It will be time enough for him to set up his lease, if the same was duly recorded previous to the registry of the act of mortgage declared upon, when the property will have been sold and the adjudicatee will seek to evict or eject him.

An injunction does not lie to test questions pending on an appeal from the judgment in the case in which the judgment is enjoined.

A vendee and mortgagee, when sued on his note for the price, cannot champion the rights, if any, of parties to whom he alleges that the payee has transferred it. On payment of the note sued on, he will exonerate himself from liability, and will be entitled to have the mortgage inscription securing the note cancelled from the mortgage register.

An intervention or third opposition by one who has obtained an order of seizure and sale to pay a note secured by vendor's privilege and mortgage, is a conservatory measure, which does not change the character of the proceedings from executory into ordinary.

M. Carroll et al. vs. *Chaffe, Syndic*, 83.

In an executory proceeding by a syndic, to enforce payment of a note secured by vendor's privilege and mortgage, it is not necessary to accompany the petition for the seizure and sale of the property with any evidence of transfer of the note by the insolvent, who was the payee, to his creditors. Possession of such note by the syndic, even if unendorsed, is a presumption of such transfer. What title the payee had to it has passed to his creditors by the surrender and by the acceptance of it by the court.

In such a case it is sufficient for the syndic, under proper averments, to exhibit authentic evidence of his appointment as syndic of the creditors of the insolvent payee, the note and an authentic copy of the act of sale and mortgage.

Chaffe, Syndic, M. Carroll, 115.

A married woman separated in property mortgages her plantation, and dies, leaving a will and the property mortgaged to her surviving husband. The husband dies before the wife's will is probated, leaving by will the same property to his nephew. Under an order of seizure and sale the mortgaged property is seized, and the proceedings are conducted contradictorily with the executors of the husband's will. The executors enjoin, and their injunction is dissolved, and the executors do not appeal, but an appeal is afterwards taken by the legatee under the husband's will. *Held*, that such appellant cannot urge, for the first time before the appellate

EXECUTORY PROCESS—*Continued.*

court, that the order of seizure issued on insufficient evidence, and that the wife's succession was not represented in the proceedings, there being no such issues raised by the pleadings in the injunction suit, to which pleadings the attention of the Court must be confined.

S. B. & J. T. McClellan vs. *Maxwell et al.*, 318.

EXPROPRIATION.

In suits for the expropriation of lands for railroad purposes, the owners are entitled to the value of the lands expropriated, and also to damages, in addition to those sustained by the taking of the land.

Under our present Constitution private property can neither be taken nor damaged for public purposes without adequate compensation.

In estimating this adequate compensation, the location of the road bed near buildings, or so as to divide a cleared field, or the fact that it disturbs or destroys the system of drainage, and like circumstances, should be taken into account.

Since the damages in such cases are continuous and will last while the railroad remains, all the damages, present and prospective, which the land owner will suffer, should be assessed.

R. R. Co. vs. *H. T. Dillard*, 1045.

GARNISHEE.

In a garnishment process the judgment of the court ordering the surrender to the sheriff of the property held by the pledgee, and the sale of such property in satisfaction of the creditor's judgment, provided that no adjudication thereof be made unless the amount bid be sufficient to pay the garnishee's claim, is correct in law. In such cases the creditor cannot insist on an absolute sale, unless the amount of the bid would be sufficient to realize something for him, after satisfying the garnishee's privileged claim.

To successfully traverse the garnishee's answers the plaintiff must show that they are false, by positive written proof, or by the oath of two witnesses worthy of belief. C. P. Art. 264.

H. Bier vs. *Gautier & Godchaux*, 206.

When the answer of the garnishee denies any indebtedness to the defendant, no judgment can be rendered against the said garnishee, without a rule or other proceeding to traverse the answers of the garnishee. C. P. 264; 16 An. 253, 348; 19 An. 374; 27 An. 93; 28 An. 691; 6 An. 122; 31 An. 865; 32 An. 280.

It is only when the answers of the garnishee are an unconditional and unqualified confession of indebtedness to the defendant, that judgment can be rendered *pro confessis* against him. C. P. 246.

GARNISHEE—*Continued.*

Any proceeding to traverse or disprove the answers of a garnishee must be filed within twenty days after such answers are filed, or the garnishee is released. Act No. 27 of 1877; 31 An. 546.

J. David vs. *F. C. Rode*, 961.

HABEAS CORPUS.

The fact that a grand jury has found a bill for a capital offense is of itself a sufficient presumption of guilt to preclude any inquiry into the merits of the prisoner's case upon a *habeas corpus*, or upon an application to be bailed.

The constitutional provision that all persons shall be bailable, unless for capital offences, where the proof is evident, or the presumption great, is common to every Constitution this State has had, and its uniform judicial interpretation has been that the finding of a bill for a capital offence creates a presumption of guilt, sufficiently strong to preclude further inquiry into the merits of the prisoner's defence on an application for bail, and this presumption extends to all purposes except to that of a fair and impartial trial before a petit jury.

State ex rel. Hunter vs. *Sheriff*, 605.

HOMESTEAD.

Where a man dies leaving a widow in necessitous circumstances and an insolvent estate, and the widow dies without claiming the $1,000 reserved to her by law, and the children of the deceased are all majors, but there are minor grandchildren of the deceased, the offspring of a daughter who died previously to them, these grandchildren are entitled to the $1,000 from the succession, in preference to the major heirs or creditors.

Successions of A. Vives and Wife, 371.

Claims of homestead exemptions, affecting debts and contracts which existed previous to the adoption of the Constitution of 1879, must be controlled by the legislation in force at the time that the contract was entered into.

Homestead rights existing under the Act of 1865, cannot be affected by the provisions of the present Constitution, or of any laws passed in pursuance thereof. Affirming Poole vs. Cook, 34 An. 331; Gilmer vs. O'Neal, 32 An. 980.

W. H. Thomas vs. *Guilbeau, Sheriff*, 927.

HUSBAND AND WIFE.

Where a husband has been a party to an act of purchase of immovable property in the name of his wife, reciting that the purchase has been made with her paraphernal funds, and that the property is to be and remain her paraphernal property, neither he nor his

HUSBAND AND WIFE—*Continued.*

legatees or simple heirs will be permitted to contradict such recitals or go behind the deed. Creditors or *forced heirs* alone can do so, and the latter only to the extent of their légitime, and for the purpose of protecting the same. 31 An. 124; 33 An. 688; 34 An. 374; 9 An. 242; 30 An. 1036.

J. Kerwin et al. vs. *Hibernia Insurance Co.*, 33.

Improvements erected during marriage on the separate property of one of the spouses, even though made with community funds, belong to the owner of the soil, subject only to the duty of paying to the community at its dissolution the enhanced value of the property resulting therefrom. Art. 2408 C. C. clearly establishes that the enhanced value, above referred to, is only due to the community where the improvements have been made with community funds or labor.

In determining this question, the Article clearly contemplates proof to be made on both sides. Whether, in absence of any proof whatever on the subject, the bare fact that the improvements were made during the existence of the marriage, would be sufficient to establish the community right, need not be here decided. The presumption flowing from such fact, if it exists, is a light one; and we hold the evidence offered herein is sufficient to rebut it.

During the pendency of an action for separation from bed and board, the husband is not entitled to the exclusive benefit of revenues of common property, but on settlement of community must account therefor.

Mrs. J. Dillon vs. *L. Dillon*, 92.

The produce of the industry and labor of a wife, not separate in property, falls into the community; all business conducted by her labor and industry is the business of the community. Actions for damages for injuries to such business, as well as personal actions of the wife for injuries to her reputation, credit and feelings, must be prosecuted by the husband, as head of the community, and the wife cannot stand in judgment therefor.

A judgment in favor of the wife alone on such causes of action must be reversed.

J. Ford and Wife vs. *Brooks, Constable*, 157.

A husband may convey to his wife his interest as beneficiary heir in a succession. Such interest is susceptible of delivery, though the succession, at the time, is under administration. Nor does the wife, by a purchase of such interest, bind herself for her husband's debts. A recognition of such transfer by the administrator in his account, and his proposal to pay the fund representing such inter-

HUSBAND AND WIFE—*Continued.*

est to the wife, is evidence sufficient of his receiving notice of such *dation*. No notice to the co-heirs is requisite.

Successions of J. Webre and Wife, 266.

A married woman cannot recover damages for a violation of a contract, made by third parties with her husband, when there is no proof that the contract was made on her behalf or by her authorization, and when there is neither allegation nor proof that she was carrying on the business for which the contract was made, nor that her husband was her agent therein.

Max Nihoul vs. *Desforges, Montagnet & Co.*, 565.

Under the provisions of the Civil Code, Arts. 2387, 2391, the wife has the right of demanding the administration of her paraphernal property, previously confided to her husband, whenever she chooses, and this will include the restitution of the proceeds of such portions of her paraphernal property as may have been sold by the husband.

This demand need not be predicated upon, or accompanied by, a demand for separation of property or dissolution of the community.

Mrs. Weber vs. *Husband*, 806.

IMPUTATION.

A party who holds three judgments against the same debtor cannot be allowed to impute a part payment to the interests accrued on all three of his judgments, when it appears from the record that the sum realized by means of an attachment issued in only one of his judgments, to which the credit must be imputed.

Standifer & Co. vs. *J. A. Covington*, 896.

INJUNCTION.

The Court is without authority to impose damages in the same judgment dissolving an injunction taken out to restrain the collection of a license.

E. King vs. *Labranche, Tax Collector*, 305.

A party seeking to be appointed dative executor cannot be injoined from further prosecuting his demand in the courts. The remedy is by opposition to the application and appeal from an adverse judgment.

B. E. Hall, Executor, vs. *C. R. Egelly*, 312.

In an action on an injunction bond furnished to stay execution of an order of seizure and sale, the damages provided for by Article 304 of the Code of Practice, which are punitory in their character, cannot be allowed. In such an action only specially alleged damages can be recovered.

INJUNCTION—*Continued.*

In such cases, however, counsel fees for the dissolution of the injunction may be allowed, even when not proved to have been paid; it suffices that the liability therefor has been incurred.

An exception that the action is premature is dilatory in its character, and must be pleaded *in limine.*

T. O. Meaux vs. *Pitman et als.*, 360.

Where an injunction was taken against an order of seizure and sale for the payment of the price of property, on the ground that suit had been instituted against the purchaser for recovery of the property, and when the evidence shows that such suit was actually pending at the date of the injunction, the fact that, before trial of the injunction, the eviction suit had been finally decided in favor of the title, and the consequent dissolution of the injunction could not render the sureties on the injunction bond liable in damages, because the injunction had not been "wrongfully obtained." C. P. 298, No. 9.

D. R. Carroll vs. *Readheimer et als.*, 374.

The evaluation of damages which would be sustained, in the event of the commission of a certain act, to prevent which an injunction is sought, is the evaluation of the right, the invasion of which is feared and which is the matter in dispute.

The value of the right of possession, use and enjoyment claimed in this case, being stated as exceeding one thousand dollars, this Court has jurisdiction of the suit.

A tenant, like the owner of enclaved property, has a right of way of ingress and egress to and from the spot leased.

An injunction does not lie to prevent the lessee from using a wagon for the conveyance of his goods and effects, where it is shown that such use is almost indispensable and does not prove injurious to the lessor or of others having a right otherwise to complain.

The case would be different should the lessee misuse or abuse the privilege.

R. R. Co. vs. *McCloskey*, 784.

An injunction prohibiting the dilapidation of valuable real estate, and the construction of buildings thereon, although the property be in the possession of the party enjoined, should not be dissolved on a bond for an insignificant amount.

Where circumstances allow, the injunction should not be dissolved unless contradictorily.

J. Baldwin vs. *Bellocq et al.*, 982.

The test of jurisdiction in an injunction suit, where the property seized belongs to the judgment debtor, is the amount of the judgment injoined.

INJUNCTION—*Continued.*

Aliter if the property of another is seized, in which case the value of the property determines the jurisdiction.

J. C. Munday vs. *Lyons et al.*, 990.

INSANE PERSONS.

An insane person is incompetent to prosecute a suit either in her own behalf or as tutrix of minors.

A person who is neither curator nor tutor, cannot bring an insane person or minors into court, because no judgment rendered would be *res adjudicata* as to said insane person or minor.

J. Kerwin et al. vs. *Hibernia Insurance Co.*, 33.

Evidence as to mental condition, acts and conduct of a party prior to and up to the time of a contract, which would not sustain a proceeding for his interdiction, is not sufficient to establish his incapacity to consent to a contract. The law protects persons physically and mentally weakened by disease, even though not to an extent sufficient absolutely to destroy contracting capacity, against fraud, undue influence and overreaching by persons dealing with them; but, in this case, such circumstances are not established as would justify the annulment of the contract on any ground.

Baumgarden, Curatrix, vs. *J. J. Langles*, 441.

INSOLVENCY.

A rule lies at the instance of a definitive syndic to compel a provisional syndic to render an account.

The provisional syndic is not bound to render such account, from hand to hand, to the definitive syndic. He has the right of rendering it to the definitive syndic through the channel of the court, and of having all issues raised by oppositions to it adjudicated upon by the court.

The *ex-parte* homologation of such account, regardless of an exception to the right of filing such account, is a nullity and may be disregarded by the court.

T. R. Wood vs. *Creditors*, 257.

The decree of a court accepting a surrender and ordering a meeting of creditors, cannot be attacked collaterally by the party who provoked it, in the absence of nullities apparent on the face of the proceedings.

The appointment of a syndic, who has qualified, is subject to the same rule.

Proceeds in the hands of a sheriff, resulting from the sale of property of the insolvent, form part of his assets, and must be turned over

INSOLVENCY—*Continued.*

to the syndic of his creditors for distribution among them *in concursu.*

A judgment directing the delivery of such proceeds for such distribution does not strip the suing creditor of his rights, if any, thereto, which he will be at liberty to assert when an account shall be presented for a repartition of funds.

J. A. Bajourin vs. *D. S. Ramelli*, 783.

INSURANCE.

In a contract of insurance, the condition requiring preliminary proofs is one introduced solely for the benefit of the insurer and which he may waive either expressly or by implication; and where prolonged negotiations for settlement are conducted without such proofs, and settlement is finally declined upon grounds entirely exclusive of the absence of such proofs, this amounts to a waiver thereof.

The effect of such waiver is equivalent to the striking of such condition out of the contract.

The defense of fraud and false swearing in a statement of loss, requires that the swearing must not only be false, but knowingly and wilfully done with intent to cheat the Company. And where such statement was only made, as a preliminary to suit, after the insurer has made full investigations and after it has finally refused to settle the loss, and after negotiations for such settlement have been finally broken off, exaggeration of the loss contained in such statement cannot be construed as having been made with the intent or expectation to deceive or mislead the Company.

The condition authorizing the Company to rebuild cannot be invoked to defeat an action for pecuniary indemnity, unless the Company has distinctly elected to rebuild and has insisted thereon and put the insured in default for refusing to permit such rebuilding.

Charges of attempts by insured to bribe the Company's inspector and a builder are not clearly sustained in this case; but even if they were, however reprehensible, they do not, by themselves, fall within any condition of the policy, and cannot have the effect of extinguishing the Company's liability under the policy.

C. Daul vs. *Fireman's Ins. Co.*, 98.

Where a policy of insurance on buildings issues to a party, but the loss is, by the terms of the policy, made payable to another, who, the evidence shows, holds a special mortgage on the property, the party to whom the policy issues cannot alone and without authorization from the beneficiary maintain a suit to recover the loss.

Where, in the same policy, a lot of furniture is insured on account of

INSURANCE—*Continued.*

another party, the suit to the extent of the loss on the furniture will be maintained in the name of the policy holder, where it is shown that such beneficiary has authorized the suit for his benefit and his ownership of the furniture is proved.

J. Lane vs. *Sun Ins. Co.*, 224.

A stipulation in a policy of life insurance, issued by a Massachusetts company, that the unpaid portion of the year's premium shall always be considered as an indebtedness to the company, and that the failure of the insured to pay any instalment of premium when due shall operate a forfeiture of the policy, except as provided in Chapter 186, Laws of the Commonwealth of Massachusetts, approved April 10th, 1861, does not violate the provisions of that statute. Under such a contract the amount of the unpaid premium must be deducted from the net value of the policy at the date that the premium becomes due and is not paid, in ascertaining the net single premium remaining to the credit of the insured, and intended by the Statute to carry a temporary insurance, notwithstanding his failure to pay the stipulated instalment of premium when it became due.

M. Van Creelen vs. *Massachusetts Ins. Co.*, 226.

A son-in-law has not an insurable interest in the life of his mother-in-law.

When the insurable interest arises or is implied from relationship, it will be held to exist when the relationship is such that the insurer has a legal claim upon the insured for services or for support.

Even where such legal claim does not exist, but from the personal relations of the insurer and the insured, the former has a reasonable right to expect some pecuniary advantage from the continuance of the life of the latter, or to fear loss from his death, an insurable interest will be held to exist.

A policy of insurance, procured by one for his own benefit upon the life of another, the beneficiary being without interest in the continuance of the life insured, is against public policy and therefore void.

L. Rombach vs. *Piedmont & Arlington Ins. Co.*, 233.

The condition in a policy of insurance that claims thereunder shall be barred, unless judicially prosecuted within one year from the date of loss, is legal and not violative either of express provisions, or of the policy, of the law of prescription of this State.

The fact that plaintiff was arrested and prosecuted for arson, especially when such prosecution was not at the instance of defendant, furnishes no excuse for non-compliance with such condition.

M. Edson vs. *Merchants Ins. Co.*, 353.

INSURANCE—*Continued.*

A discrepancy, even if it be material, between the statements of the assured under oath in his proof of loss, and those made at the trial, does not constitute the false swearing that works a forfeiture of all claim under a policy of insurance; nor does an over-statement of the value of the property work such forfeiture, for a great difference of opinion upon values may well co-exist with perfect honesty of all the persons differing. The assured may have sworn to what he believes to be true, but which nevertheless is false, and his policy would not thereby be forfeited. To work such forfeiture, the assured must knowingly and intentionally, and therefore fraudulently have sworn with the intent to deceive the insurer and get from him a value falsely put upon the property.

A. Erman vs. *Sun Ins. Co.*, 1095.

In a contract of insurance, the insurer has the right to cancel the policy for non-payment of the premium, and is entitled to recover premiums earned during the time that he carried the risk.

Hibernia Ins. Co. vs. *F. A. Blanks*, 1175.

INTERVENTION.

An intervenor has no right to substitute himself to a defendant, and raise issues not set up by him; particularly, where he is a third possessor, acquiring real estate, mortgaged with the pact *de non alienando*, for the payment of a sum of money, and has legal notice of the mortgage and pact.

Such intervenor cannot require security against the appearance of the lost mortgage note, where defendant did not ask the same.

Mrs. M. Mayer vs. *L. Stahr*, 57.

The bond which intervenors are authorized to furnish under the provisions of Act No. 51 of 1876, to be restored to the possession of property attached, sequestered or provisionally seized in their hands, is a *forthcoming* bond, designed merely to secure the return of the property at the final determination of the suit, and under which no personal liability for the judgment to be rendered attaches.

Where the condition of the bond has been fulfilled, namely, the property has been surrendered in the condition in which it was received, the intervenors and their surety are entitled to be discharged.

S. Meyer vs. *Fletcher, Wesenberg & Co.*, 878.

JUDGMENT.

Under our jurisprudence a final judgment is the property of the party in whose favor it was rendered, and such party or his assignee or

JUDGMENT—*Continued.*

subrogee alone has the part to issue and control execution thereon. The District Court, to whom a cause is remanded from this Court, cannot execute the judgment rendered in the case in a manner differing from the order of this Court. In such a case the functions of the District Court are merely ministerial. It cannot render any new judgment which would authorize or render an appeal necessary. The execution which it orders is subject to the revision of this Court. And any error which it may commit in directing such execution, will entitle the party aggrieved to an appeal.

State ex rel. Southern Bank vs. *Pilsbury, Mayor, etc.*, 403.

The judgment of a Tennessee court can no longer be rendered *executory* in this State. The only remedy of the holder is to sue upon it as the evidence of a debt and to recover a judgment in a Louisiana court for the amount thereof, which will be a Louisiana judgment and executed as such. The court here is not concerned with the mode of execution of Tennessee judgments in that State, but only with the question whether the judgment is binding on the party sued here and has the effect of establishing, as a thing adjudged, the existence of a debt. If so, it entitles him to judgment in a Louisiana court for the debt evidenced thereby. In a former proceeding in this case, it was held that the defendant was bound by the judgment sued on, and on the merits no valid defense thereto has been established.

T. W. Turley vs. *Dreyfus, Executor*, 510.

An answer made by the defendants, in which they neither deny nor admit any of the allegations of the petition, but submit the case to the determination, joins issue as effectually as a judgment by default could have done. Such an answer and such judgment throw upon the plaintiff the burden of establishing the allegations of the petition as fully as if a special denial of each had been filed.

A judgment rendered on an issue formed by such answer, is not a consent judgment. Where rendered by a court, after hearing evidence and an opposing intervenor, it must be viewed as the result of the exercise of a judicial discretion, and as a decision of the issues presented.

H. V. Bayhi vs. *Bayhi et als.*, 527.

A judgment not final in its nature and character cannot be made final by the mere fact of its being signed by the Judge.

An interlocutory judgment which does not cause irreparable injury is not appealable. The ruling in Harris vs. Stockett, 35 An. reaffirmed.

State ex rel. Pflug vs. *Judge, etc.*, 765.

JUDICIAL MORTGAGE.

A recorded judgment operates as a judicial mortgage on real estate acquired by the judgment debtor, though his act of purchase be not recorded. The judgment creditor can, by the hypothecary action, subject the property to the satisfaction of his judgment, in case of the sale or transfer thereof. The purchaser of the real estate thus burdened has no right to urge defences against the judgment and mortgage which his vendor could not have set up.

Heirs of Gallaugher vs. *Congregation*, 829.

JUDICIAL SALES.

The adjudicatee of property at judicial sale, being entitled to pay but once to receive a clean unincumbered title, when harrassed by conflicting claims of mortgage and other rights, may call the various claimants to interplead and settle their claims contradictorily with each other, to the end that he may pay advisedly to his secure exoneration.

Under the peculiar constitution and rules of the Civil District Court for the Parish of Orleans, such a proceeding, having all other elements of a direct action, may be filed in the suit in which the adjudication was made.

The erroneous styling of such a petition as an *intervention* will not invalidate it, if it contains the essentials of a proper and lawful action.

J. C. Morris vs. *Cain et al., Executors*, 759.

An injunction staying an executory process cannot have the effect of impairing the legal value of the notes and mortgage on which the process had issued.

If the property be seized by the holder of a mortgage inferior in rank, during the pendency of the injunction, and if it be adjudicated to the owner of the ranking mortgage, the adjudicatee has the legal right to retain the amount of his mortgage in satisfaction *pro tanto* of his bid.

E. B. Mentz vs. *Train et als.*, 955.

JUSTICE OF THE PEACE.

Under the provisions of Article 1084, C. P., either party is entitled to delay for the purpose of preparing his case, in a cause pending before a justice of the peace, on the first fixing of a cause.

Under Article 1085, if the parties fail to appear at the appointed time, and if they reside in the country, the justice of the peace must wait two hours before he can render a valid judgment in the premises.

State ex rel. Montague vs. *Justice, etc.*, 1101.

LANDS.

Where the government, in the Act of Congress confirming a title to land, makes special reservation of the rights of all parties then claiming an interest therein, such parties are remitted to the State courts for the litigation of their claims.

The holder of a patent with such reservation will be considered as plaintiff in a petitory action against adverse claimants, whatever be the form in which he makes the attack, and must therefore recover on the strength of his own title.

L. Lavedan vs. *F. F. Trinchard*, 540.

Land held under a certificate of entry enters the domain of private property and becomes a subject of contracts, and is fully under the operation of our laws touching the property rights of all classes of persons, and such certificate is sufficient evidence to support a petitory or other real action.

Where land is entered in the name of the wife during the marriage, but the patent issued after the community is dissolved by a judgment, the land will be presumed to be an acquisition of the community. The title dates from the certificate and not from the patent.

Simien, Admr., vs. *Perrodin et als.*, 931.

The State of Louisiana, during the war between the States, preserved her autonomy, and possessed a fully organized government.

She did not forfeit her title to the swamp lands previously acquired by becoming a member of a Confederacy at war with the United States. During the pendency of the war she had the power to sell her lands, and her officers charged with such duties to make the sales, and the purchasers acquired valid titles, if the State laws relating to such sales were complied with.

There is a legal presumption that all swamp lands were surveyed before their selection was approved by the general government. The law required them to be surveyed before presented for approval, and the officers charged with approving them are presumed to have done their duty.

The same presumption exists in case of entries, under the State preemption laws, that the conditions have been complied with, and it is only the conclusive evidence that can overthrow such presumptions.

Where plaintiff and defendant both hold title from the State, the first purchase must prevail, if not successfully impeached.

R. T. Cole vs. *Thompson et als.*, 1026.

LEASE.

The goods of a third person found in a leased store, where they had been consigned by their owner to the lessee, to be sold by the lat-

LEASE—*Continued.*

ter at a price fixed by the owner, with the understanding and agreement that the lessee or consignee could keep, as his compensation, all that he could obtain above the inventoried prices, and that no rent or storage was due by the owner, will be affected by the lessor's privilege, and are liable to the latter's seizure for unpaid rent due by the lessor.

W. M. Goodrich vs. *T. B. Bodley*, 525.

In absence of all privity between plaintiffs and defendants, the former, who are lessees of the wharves from the City, and have no rights except such as are derived from the City, can claim no rights against the defendants as former lessees, which the City herself could not have urged against them. Under the contract between the City and defendants, as construed by both parties thereto, the defendants had the right to collect and appropriate the entire wharfage due by vessels which had moored at the wharves prior to the expiration of their lease; and as the City was estopped from claiming return of any portion thereof, plaintiffs cannot do so. If the City has transferred to them a right which she did not possess, they must look to her for indemnity, and not to defendants.

J. A. Aiken & Co. vs. *Eager, Ellerman & Co.*, 567.

The subrogee to a lessor's rights is entitled to claim, with provisional seizure, whatever rent was due at the date of the transfer.

A stipulation is a lease to pay part of the rent to a person named, does not divest the landlord of a right to the amount, where the stipulation *pour autrui* was not accepted previous to the transfer. The subrogee is entitled to claim such amount in the right of his subrogor.

The burden of proof is on him who alleges payment. The plea admits the debt.

Damages cannot be allowed to a seized tenant, where the rent claimed was due at the date of seizure.

W. A. Martin vs. *L. Dickson*, 1036.

MANDAMUS.

In case of mandamus against public officers in Louisiana, the proceeding does not abate by the retirement from office of such officers.

A mandamus does not lie against the City of New Orleans, to compel the budgeting of a judgment which is a nullity on its face.

State ex rel. Company vs. *New Orleans*, 68.

A mandamus lies to compel the granting of an appeal from a judgment dismissing part of a petition and part of the prayer thereof.

MANDAMUS—*Continued.*

It is no defense to an application for such remedy, that the case, for the remaining part, continues pending before the court, or that the judgment is interlocutory and causes no irreparable injury.

Such judgment is a *final* judgment, requiring, as in fact it received it, signature by the Judge.

The fact that the plaintiff continued the prosecution of the remaining part of the case and that he did not, upon the refusal of the appeal, apply for a mandamus, cannot be considered as an acquiescence in the judgment, or an abandonment of his right of appeal.

State ex rel. Ikerd vs. *Judge, etc.*, 212.

A mandamus cannot lie to compel a District Judge to grant an appeal to the court from a judgment dismissing a case, as to one of the defendants, where an exception is filed to the jurisdiction, and the petition in the suit shows that the amount claimed is less than one hundred dollars.

Such dismissal does not extinguish the corporation, plaintiff in the case. The suit continues to be pending as to the other defendant.

State ex rel. Page, etc. vs. *Judge, etc.*, 217.

A mandamus lies to compel a District Judge to sign *de nova* a final judgment improperly signed by him. An appeal is not the only mode to test the validity of such signature.

Such judgments do not become final unless upon being signed in the manner and form prescribed by law.

State ex rel. Orleans R. R. Co. vs. *Judge, etc.*, 218.

A mandamus cannot be granted where, if allowed, it would prove unavailing.

It does not lie against municipal authorities in existence in 1883, to place a sum on the City budget of 1879, when the revenues and receipts of that year, as therein stated, have been applied to the expenditures therein specified.

The rights of the relator are secured by the registry of his judgment, under Act 5 of 1870 and the ruling in 33 An. 129.

The decision in the Southern Bank case, 31 An. 1, is no authority, having been reversed in all its parts by the U. S. Supreme Court.

State ex rel. Fazende vs. *New Orleans*, 221.

A mandamus is the proper remedy to compel an inferior Judge to sign bills of exceptions properly taken and tendered for signature, and, under the circumstances of this case, the mandamus is granted.

State ex rel. Wyly vs. *Judge, etc.*, 248.

A mandamus does not lie to compel an attorney appointed Judge *ad hoc* to try a cause in which the District Judge has recused himself,

MANDAMUS—*Continued.*

when the question of the validity of the recusation, which involves that of the legality of the appointment of the Judge *ad hoc*, is pending, on a suspensive appeal, before the appellate court.

State ex rel. Perché, etc., vs. *Judge, etc.*, 603.

A mandamus does not lie to the Court of Appeals, to compel it to take jurisdiction of a case which it has dismissed, where it appears that the amount claimed or the matter in dispute exceeds one thousand dollars.

It is indifferent whether the demand be made in a direct suit, or in an opposition to an administrator's account in the settlement of a succession, showing for actual distribution an amount less than $1,000.

State ex rel. Dupierris vs. *Judges, etc.*, 736.

A mandamus lies to compel the granting of a suspensive appeal from an order directing the delivery of a bank box, said to contain effects of a value exceeding one thousand dollars.

The delivery might occasion an irreparable injury.

On an application for the remedy, the appellate court cannot pass upon the correctness of the order of delivery.

State ex rel. Baumgarden vs. *Judge, etc.*, 745.

Neither the District Court, nor this Court, has jurisdiction to issue a mandamus, to a municipal officer of the City of New Orleans, for the purpose of drawing money from the municipal treasury.

Section 1 of Act 5 of 1879 is an absolute prohibition and must be respected.

It applies to all persons and to all claims, whether liquidated or not by judgment or otherwise.

It does not deprive creditors of other process.

A mandamus may issue at the instance of judgment creditors, under other Sections of the Act, for other purposes. It does not lie for the object of this proceeding.

State ex rel. Klein & Co. vs. *New Orleans*, 781.

A mandamus does not lie to compel a Judge to render judgment, or to sign one which is tendered him by counsel, in accordance with the verdict of a jury, when there is a motion for a new trial pending and undecided, and where the Judge *proprio motu* has quashed the verdict and reinstated the case to be tried anew.

State ex rel. Wentz vs. *Judge, etc.*, 873.

Mandamus will issue to compel the granting of a suspensive appeal in a case where the constitutionality or legality of a fine, forfeiture or penalty, imposed by a municipal corporation is involved, although the pleading before the municipal authority may not

MANDAMUS--*Continued.*

have set forth the particular law or constitutional provision violated. The sufficiency of the defense will be adjudged on the appeal.

State ex rel. Roos vs. *Shreveport*, 887.

A mandamus does not lie to compel a District Judge to appoint an attorney-at-law to try a case in which he has recused himself as having been of counsel, when the court, of which he is an officer, is represented by another Judge clothed with concurrent powers, and who is not himself recused.

The Act of 1880, No. 40, is inoperative in such a case.

Under Act of 1882, No. 71, the Judges of the District Court for the First Judicial District are authorized to adopt rules for the classification and distribution of causes before that Court, and to provide for the trial of recused cases.

A prohibition does not lie to prevent the other Judge, not recused, from trying such cases in which his fellow Judge is recused as of counsel.

State ex rel. Hardenburg vs. *Judges, etc.*, 1007.

MARITIME LAW.

Where the terms of a charter party show that the vessel chartered is to carry freight and passengers, and it is shown that either freight or passengers were carried, the charterers will be held commercial partners, and bound *in solido*.

It is not a breach of the warranty of seaworthiness, that the master of the vessel was drunk at the port of delivery whilst the cargo was being discharged, where the duty of discharging devolved on the consignees of the charterers.

Thomas O. Mahoney vs. *A. Martin et al.*, 29.

MARRIAGE.

In the absence of primary evidence to prove marriage, it may be proved by secondary or circumstantial evidence.

Reputation and long cohabitation will create a presumption of marriage; but such presumption can be rebutted by negative testimony.

Acts of the parties, showing their own conception of their mutual relations, are the best test of the legality of marriage, of the celebration of which no proof has been, or can be adduced.

The reputation which gives rise to a presumption of marriage must be general and consistent, and must rest on proof showing that the relations between the parties began with a free consent to enter the state of matrimony.

Mrs. Powers vs. *Executors of Charmbury*, 630.

MARRIED WOMEN.

The Judge of the late Second District Court for the Parish of Orleans was competent to exercise the functions of authorizing married women to contract loans, etc., under C. C. Arts. 126, 127, 128.

It is now settled that in loans made under such judicial authorization, the lender is not bound to look behind the Judge's certificate, and is not concerned with the actual use to which the money loaned to the wife is put.

Mrs. Dougherty vs. *Hibernia Ins. Co.*, 629.

A married woman has the right to borrow money and to secure its return by mortgage on her property, with the authority of her husband, given concurrently with that of the District Judge of her domicile, or without it.

Where judicial sanction is obtained, the creditor is relieved of the necessity of proving the loan, and that it enured to her benefit; the burden is upon her, under proper charges, to prove that she is not liable. Where the sanction is not procured, the creditor is required to make the proof.

The authority of the Judge is cumulative, not restrictive or exclusive in character.

F. A. Darling vs. *Lehman, Abraham & Co.*, 1186.

MINORS.

Where minors are interested in an immovable owned in indivision by several co-owners, a judicial partition is the only mode of making a legal division of such property. The co-owners of an undivided portion of a large tract of land cannot effect a legal partition of the same without making the owners of the other portion of the said property parties to their suit for partition.

An undivided portion of a larger and undivided tract of land cannot be legally partitioned among the owners thereof.

C. Ware et al. vs. *A. Vignes et als.*, 288.

Where a third person owes to a minor a debt secured by mortgage, which is due, he has the absolute right to pay the same to the duly qualified tutor of the minor, and thereby to extinguish the mortgage. And because the tutor has squandered the money, that is no reason why the minor may have recourse upon his former debtor or his assignees.

P. G. Riddell vs. *A. Vizard*, 310.

Specific compliance cannot be required from the purchaser of real estate where the title tendered is not clear and good, and not such as he is bound to accept.

Where a tutor sells at private sale his individual share of a piece of

MINORS—*Continued.*

real estate, against which his minors' mortgage stands recorded, the share is transferred burdened with the encumbrance, which continues to attach thereto until removed.

Where the property, part of which was thus conveyed, is offered for sale under a judgment in partition, and it appears that the price corresponding to the minors' share is not paid to the tutor then in office, but that a similar sum was paid, years previous, to one who was then tutor, who had then no authority to sell, and who has since ceased to be such, and the sale is made on terms at variance with those fixed by the family meeting and approved by the court, the minors' share was not divested and no title thereto did pass to the adjudicatee.

The property of minors can be sold only upon the observance of legal exigencies and upon settlement of the price of sale with one having authority to receive the same and who can make the title.

H. Abraham vs. *Widow C. Lob*, 377.

The capacity of a tutrix cannot be attacked collaterally; neither can that of an under-tutor.

Where proceedings are carried on for the sale of minors' property, in the name of a tutrix, by an attorney-at-law of undisputed authority, and they appear substantially regular and were conducted contradictorily with the under-tutor, a decree of sale from a competent court is protection to the purchaser.

The law does not require that proof be made to the Judge, before he grants the order for a family meeting, that there exists a necessity or propriety for the sale. The members of the meeting are a specially constituted tribunal to pass primarily on such issue. Property of minors can be sold when it is unproductive and onerous, for it is then advantageous that it should be disposed of.

Payment of the price to a specially authorized agent of the tutrix is payment to her and concludes the minors.

Succession of J. Hawkins, 591.

An irregularity in the transfer of minor's property may be ratified by him after his majority. And such ratification may be inferred from long continued silence and inaction on his part touching the property.

Mrs. A. Jamison vs. *P. Smith*, 609.

Where a man dies, leaving a widow in community and one minor child issue of the marriage, and the mother qualifies as natural tutrix and remains in possession of the estate, she can, by the authority of the Judge under the advice of a family meeting, borrow money to pay the debts and charges upon the estate, and mortgage property

MINORS—*Continued.*

to secure the loan. The property is regarded as the effects of her ward administered for his ultimate advantage.

Where there is no tutor, the minor is properly represented in the proceeding to foreclose the mortgage by a *curator ad hoc.* C. P. 116; 34 An. 885.

Though, in an executory proceeding, the notice to the debtor is issued by the sheriff instead of by the clerk, it is not such an irregularity as to justify the annulling of the sale made under the proceeding, nor does the failure of the record to show that the under-tutor took the prescribed oath, where it appears he was appointed and was present at the family meeting and approved the proceedings, constitute a sufficient ground of nullity.

Succession of Sadler vs. *B. J. Henderson*, 826.

A party who receives funds for minors, without having been appointed and qualified as tutor, assumes the responsibilities of an intermeddler or *negotiorum gestor*, and will owe interest on such funds from the day that they were received by him.

The claim for the recovery of such funds is subject to the prescription of ten years, to be computed from the age of the majority of the minors.

Succession of W. L. Richmond, 858.

When a minor is lawfully summoned by a sheriff to serve as a member of a *posse comitatus* to aid in the arrest of an escaped convict and, while so engaged, negligently and with legal fault shoots another member of the same *posse* by mistake for the convict, the parent of the minor with whom he resides cannot be held responsible for the damages occasioned thereby.

The law obliged the minor, being of proper years, to serve on the *posse*, and suspended the paternal authority, and subjected him to the exclusive authority of its officer, and paternal responsibility being the offspring of the paternal authority, the legal interruption of the latter operated a like interruption of the former.

Mrs. A. Coats vs. *J. M. Roberts*, 891.

Under the provisions of Sec. 8 of Act 95 of 1869, (R. S. 3093) on the subject of mortgages, the *affidavit* of a tutor, stating his indebtedness with necessary facts to his ward, and recorded prior to the 1st of January, 1870, is a valid registry of the minor's tacit mortgage, and preserved it as effectually as if an extract of the inventory of his estate had been registered.

This ruling is made in a case in which, at the time of inscription

MINORS—*Continued.*

which was the last day of December, 1869, no inventory had been taken of the minor's property.

E. Broussard et al. vs. *Segura, Clerk, et al.*, 912.

When, after the minor's mortgage has been preserved, by the inscription of the abstract of inventory under the Act of 1869, the minor arriving at the age of majority has liquidated his mortgage by account and judgment against his tutrix, the inscription of such judgment is sufficient to preserve his mortgage thereafter, and there is no necessity of reinscribing the abstract of inventory.

E. J. Smith vs. *W. W. Johnson*, 943.

MONITION.

An opponent in a monition proceeding is in no case required to make an antecedent tender as a condition precedent to opposing confirmation of sale.

Where he has engrafted on his opposition a petitory action, although the exception of want of tender may avail to dismiss the latter action, it should be restrained in its effect to this extent, and should not operate as a dismissal of the opposition.

Fazende & Seixas for Monition, 1145.

MORTGAGE.

The hypothecary action lies to compel payment of a note secured by mortgage, where the third possessor was made aware, by the recitals in his title, that the note represented by the vendor as paid was outstanding and that the inscription of the original mortgage was cancelled.

A third party acquiring such note before maturity, in good faith, in the ordinary course of business, for a valuable consideration, without any knowledge of its assumption by one who was not the drawer thereof, is not affected by equities which might exist between such party and his own vendor or a subsequent vendee, and is entitled to demand the surrender of the property mortgaged or payment of the note.

The third possessor is as effectually estopped from disputing the validity of the note and mortgage as his vendor would have been.

Parties who, by anticipation, pay mortgage notes for which they may be liable, should, at least, cancel or deface them after such payment, if not cause the mortgage inscription to be erased, in order to protect third parties.

Where one of two persons must suffer a loss, the law throws it upon him by whose negligence or fault the damage was occasioned.

George Shepp vs. *Thomas Smith*, 1.

MORTGAGE—*Continued.*

The purchaser at a public sale is entitled to demand an unencumbered title before being compelled to comply with the terms of the adjudication.

A mortgage describing the property hypothecated as "un vaste terrain à l'encoignure des rues Orléans et Bourbon," will not be held invalid for want of sufficient description of the "nature and situation" of the thing, at the instance of one who has not been misled thereby.

A mortgage made by a mortgagor alone for the security of bonds to be negotiated is not *ab initio* invalid for want of a concurring mortgagee. It stands as a valid, unilateral contract, but remaining suspended and imperfect until the bonds are issued and negotiated, when the mortgage takes effect in favor of the holders of the bonds, whose acceptance of the mortgage is sufficiently evidenced by the acceptance of the bonds secured thereby.

M. A. Roberts vs. *J. Bauer et al.*, 453.

Where the inscription of a mortgage by authentic act contains a copy of all portions of the act upon which the mortgage is based, it complies with the requirement of Art. 3348, Rev. C. C., although it be not a copy of the entire act.

Estate of L. Prudhomme, 984.

MOVABLE PROPERTY.

Personal or movable property has its *situs* at the domicile of the owner. Its administration is governed by the laws of that domicile. Movable property in another State belonging to a testatrix must be administered by the court of her domicile.

Succession of Susan B. Thomas, 19.

MUNICIPAL CORPORATIONS.

A charge or commission for an attorney's fee, where a parish license is sought to be collected by suit, imposed by an ordinance of a police jury, cannot be collected. The parishes are without authority to impose such charge.

Hunter, Sheriff, vs. *C. Lisso*, 230.

A town councilman, who became a justice of the peace, is not recusable in a case wherein the legal composition of the council, or the validity of the ordinances passed while he was a member thereof, is contested.

Alexandria vs. *Williams et al.*, 329.

The debt sued for in this case being for the current expenses of the municipal corporation, and payable out of the current revenues of the several years in which it was contracted, does not fall

MUNICIPAL CORPORATIONS—*Continued.*

within the restrictive operation of Section 2448 of the Revised Statutes.

S. G. Laycock vs. *Baton Rouge*, 475.

Municipal corporations may adopt ordinances for the good order of the community, and where the power to suppress bawdy houses is conferred, the power to adopt means for that suppression follows by necessary implication.

An ordinance which prohibits bawdy houses being kept in an indecent manner need not specify the various acts of indecency which will render its keeper liable to punishment.

Shreveport vs. *Fanny Roos*, 1010.

The power to amove a corporate officer from his office for a reasonable and just cause, is one of the common law incidents of all corporations.

The general rule is, that courts are without power or jurisdiction to impede by preliminary injunction the usual functions of a municipal corporation.

A provision in a City Charter vesting a City Council with the power to try all impeachments of City officers, the judgment only extending to removal and disqualification to hold any corporate office, is not unconstitutional as authorizing the exercise of judicial powers by a legislative or municipal body, but it is rather the exercise of a power necessary for its police and good administration.

Courts are powerless to interfere by injunction with a municipal council in the exercise of that power. An injunction thus issued is a nullity, and will be vacated by prohibition.

The State ex rel. Behan, Mayor, et al. vs. *Judges, etc.*, 1075.

Violations of the ordinances of a city, passed in the exercise of the expressed or implied powers vested in municipal corporations, and relating to acts not included in the criminal laws of the State, cannot properly be regarded as crimes to which the constitutional guarantees of prosecution, by indictment or information and trial by jury, pertain.

The constitutional prohibition against slavery or involuntary servitude does not relate to the mode of punishment of any class of offenders, but was directed against any attempt to reëstablish the system of slavery once prevailing in some of the States, or any species of servitude resembling it.

Likewise, the prohibition against fixing by law the price of manual labor refers exclusively to contract labor. Hence, where a party was sentenced by the Recorder of Monroe to pay a fine of $50, for

MUNICIPAL CORPORATIONS—*Continued.*

keeping a disorderly house, and in default of payment to work on the streets of the city at the rate of one dollar per day until the same were paid, is not illegal and void.

City of Monroe vs. *F. S. Meuer*, 1192.

NEW ORLEANS.

The property known and designated as the "*commons*," acquired by the treaty of cession of Louisiana, was donated in 1807, by the United States to the City of New Orleans, on two conditions: 1st, that a reserve would be made of a strip through it, to enable the N. O. Navigation Co. to connect its canal and basin with the river; and, 2d, that the same would forever remain open as a public highway.

The sale by the City in 1809 of lots fronting the space selected for the purpose and known generally as the "*neutral ground*," was made in reference to the dedication, as shown on the plan drawn up at the time, from which it appears that the space was described as "*Rue et Promenade.*"

The right of the Navigation Company was subsequently acquired by the City.

The destination of the strip of ground was not changed by the City. If it was altered, the City had the right to do so, derived from the Code, the Statute and her charter.

The City has authority to grant a right of way through her streets and other property.

The City first granted the privilege of way to the New Orleans City Railroad Company in 1876, but subsequently recalled it, and again in 1881 conferred it anew.

The ordinances concede the right of laying tracks from Basin to Carondelet, but not that of using *steam* as a propeller.

The plaintiffs were owners at the time the tracks were laid and did not object thereto. Their silence is an acquiescence.

The right to use steam not having been granted, the Company has no authority to run and station their trains, moved by that power, as they do, between the designated points.

The use of steam is therefore a nuisance, if not actual, at least constructive.

The injunction asked cannot issue to prevent the defendant Company from using the tracks, but only to prohibit the use of steam, between the two streets named.

F. W. Tilton et al. vs. *R. R. Co.*, 1062.

The City of New Orleans has the right to grant the privilege of laying pipes and conduits across and through the river bank and the

NEW ORLEANS—*Continued.*

public streets, to parties asking the same, to draw water from the river for their own use and purposes.

The right thus conceded does not come in conflict with those of the Waterworks Company, and can, therefore, be legally exercised under the terms of the privilege, and during the pleasure of the municipal authorities.

N. O. Waterworks Co. vs. *Sugar Refinery Co. et al.*, 1111.

NEW TRIAL.

Where it appears from anterior proceedings, that the District Judge has sustained his jurisdiction, it would be doing a vain thing to require the filing of an exception and its overruling, before considering an application for a prohibition. The rule in 29 An. 809 is not thereby infringed.

The writ does not lie to prevent a District Judge from trying exceptions filed after the granting of a new trial.

A judgment prematurely signed does not become final and produces no effect, where a motion for a new trial is seasonably made and subsequently granted.

Such motion, in the country parishes, where first continued to another term by consent of parties, and next, from term to term, by the court, and which the mover has uniformly endeavored to have tried, does not lapse at the close of either of the terms. It can be entertained and allowed by the Judge, where good cause is shown.

The granting of such a motion for a new trial practically obliterates the premature signature of a judgment.

12 An. 562; Estopinal vs. Zunts, not reported, O. B. 45, folio 24, and State ex rel. Wentz vs. Judge 5th Dist., 35 An. 873, affirmed.

State ex rel. Allen & Syme vs. *Judge, etc.*, 1104.

PARTITION.

Co-heirs have the right to sue for a partition by sale where the property held in common cannot be conveniently divided in kind, although the shares of other heirs therein be burdened with mortgages.

A judgment directing such partition cannot be attacked collaterally. If it was rendered on insufficient evidence or in disregard of the forms prescribed by law, it can only be revised on appeal. If it was obtained by ill practices, not patent on the record, the remedy is by an action in nullity.

In partition suits the validity of the adjudication does not depend upon a proportion to the appraisement. The property can be legally adjudicated regardless of the valuation placed upon it, even when minors are co-owners.

Co-heirs have a right to assemble and consult touching the propriety of

PARTITION—*Continued.*

purchasing or not the property to be sold for a partition. In case of adjudication to them, they are authorized to retain the price until their rights in the succession have been liquidated. They have the right of fixing for their respective shares such terms as they may deem most advantageous.

The fact, if it exist, that revenues or profits were yielded by the property previous to the adjudication, and are unaccounted for, does not affect the validity of the sale.

In partition suit between co-heirs, the mortgages affecting the share of any one of them are referred to the proceeds, and either of them can, *by rule* against the mortgage creditors, have them so relegated and the inscriptions thereof erased from the mortgage book. Such creditors have the right to contest the validity of the sale in such cases.

This case is differentiated from that in Life Association vs. Hall, 33 An. 53.

A distribution proposed in the lower court and not disputed on appeal will not be disturbed.

H. V. Bayhi vs. *Bayhi et als.*, 527.

Property acquired by an heir at a partition sale of his ancestor's succession, if paid for by his heritable share thereof, is and remains an inheritance, and the mode of acquisition is not a sale in the ordinary or legal sense of that word.

The resolutory condition which is implied in commutative contracts, and which inheres specially to a sale, does not attach to such mode of acquiring property.

M. A. Wade, Tutrix, vs. *C. B. Murray, Executor*, 546.

A partition defective in form and voidable for lesion may be ratified by word and deed, and made conclusive and binding.

J. S. Bacon vs. *M. C. Schultz*, 1059.

PARTNERSHIP.

Articles 1138 *et seq.* of the Civil Code, entitling the survivor of a commercial partnership to be appointed liquidator of the partnership by the court where the succession is opened, do not apply to testamentary successions.

Where the executors of the last will of the deceased oppose such appointment on just and reasonable grounds, the court is not justified in making the appointment.

In no case has the surviving partner a right to such appointment where, by the partnership contract, it is provided that such survivor shall have a certain term to wind up the business, and it is

PARTNERSHIP—*Continued.*

shown that during that time, though in possession of all of the assets of the partnership, with full powers of administration, he has taken no step towards a liquidation of the concern.

B. Klotz vs. *Macready et al., Executors*, 596.

A commercial partnership may hold title, in its firm name, to real estate, when acquired by consent of the parties, who thereby became joint owners thereof.

Allen, West & Bush vs. *Whetstone et al.*, 846.

Under the statutes of the State relative to the appointment of Branch Pilots of the Port of New Orleans, and regulating their duties, a partnership or association of the said pilots, though State officers, for the purpose of furthering and protecting their common interests, is not illegal. Under the language of these statutes such association is authorized, and excepts the pilots from any legal principle which would forbid such an association of State officers for the purposes declared.

Articles 1926, 1927, 1929 of the Code, authorizing specific performance of obligations to do or not to do in certain cases, apply to contracts of partnership as well as to other conventional obligations.

Where, by a valid contract of partnership, a partner bound himself: 1st, to devote his time, labor, skill, etc., to the partnership business; 2d, not to carry on the partnership business otherwise than as a partner, the latter negative obligation may be enforced by injunction, although the former cannot be specifically enforced.

W. T. Levine et al. vs. *B. Michel*, 1121.

PETITORY ACTION.

In a petitory action where the defendant sets up no title to the property in himself, nor outstanding title in another, but merely denies the title of the plaintiff, plaintiff is not bound to show a perfect title against all the world to entitle him to recover.

This rule is subject to modification where the plaintiff offers evidence which shows an interest of the defendant in the property.

Mrs. A. Jamison vs. *P. Smith*, 609.

PHYSICIAN.

A graduate in medicine from the University of this State is not required to make and record an affidavit of having received his degree, in order to enable him to sue for his fees. The statute upon that subject applies only to those whose diplomas are from other institutions.

The charges of a physician for services cannot be determined solely upon the basis of skill. The amount of the patient's estate, and

PHYSICIAN—*Continued.*

his consequent ability to pay, also enter into the calculation and influence it.

Czarnowski vs. *Succession of Zeyer*, 796.

PLEADING.

An exception to the capacity of the plaintiffs to sue as liquidating commissioners of a bank comes too late after answer has been filed. It must be pleaded before issue joined.

J. A. Blaffer et al., Commissioners, vs. *Louisiana Nat. Bank*, 251.

An application by a plaintiff, whose petition has been dismissed because it disclosed no cause of action, for leave to amend his pleadings, comes too late and must not be entertained. 34 An. 328, reaffirmed.

Raymond et al., Commissioners, vs. *E. C. Palmer et al.*, 276.

The plea of discussion urged by a third possessor in an hypothecary action is a dilatory exception and cannot be pleaded after default, or in an answer after plea to the merits.

The plea of confusion is disposed of by Pipes vs. Norsworthy, 25 An. 559.

The demand on the debtor, required as a condition precedent to the hypothecary action, is not required to be made judicially.

The third possessor cannot urge objections to the title of his own author.

Boone et al., Executors, vs. *M. Carroll*, 281.

The plaintiff in a suit cannot be allowed, after issue joined, to amend his original petition, if the amendment alters the substance of his demand. Hence, in a suit against a railroad company for cattle killing, plaintiff cannot amend his petition for the purpose of alleging that the Company had no right of way over his lands. A railroad's responsibility, running trains under legal rights, is different from that of a trespasser.

Mrs. Day and Husband vs. *R. R. Co.*, 694.

A new trial will not be granted to a party who judicially admits his indebtedness on an account set up against him, on the ground that he had not seen the detailed account before rendition of judgment in the case, and that the items and dates of said account are newly discovered evidence.

His admission of the indebtedness estops him from subsequently denying knowledge of the account.

Prescription and compensation are not inconsistent pleas. Hence, the previous plea of prescription is not waived by a subsequent plea of compensation.

R. J. Looney vs. *Levy, Liquidator*, 1012.

PLEADING—*Continued.*

In an action by the State against a defaulting sheriff and his sureties for public monies collected and not accounted for, an averment that the monies collected belong to a particular class and were received within a stated period will be deemed sufficient. The State cannot be required to allege matters of details not within her knowledge. It would be exacting an impossibility. Exceptions to the vagueness of the demand are properly overruled.

State vs. *Gauthreaux et al.*, 1168.

PLEDGE.

A consignor or other person, who ships to his merchant or factor, to whom he owes a balance of account, cotton, sugar or other agricultural products, and who delivers the bill of lading or receipt therefor to the steamboat or other carrier, for transmission, can do no act which may affect or destroy the pledge flowing from such consignment, under the provisions of Act 66 of 1874.

Hence, the consignee's pledge cannot be destroyed or affected by a sale made of the consigned property "*in transitu*," by the consignor, who instructs the carrier to cancel and destroy the original bill of lading, to issue a new bill to another consignee, and to deliver the goods to a different order.

J. Phelps & Co. vs. *Z. Howell*, 87.

A pledge of bonds, stocks, notes, etc., made by delivery of them is valid, as well as against third persons as against the pledgor, if made in good faith.

Simulation of ownership of bonds and stocks may be shown by parol proof, as between the parties to the simulation.

Third parties, who have dealt with the apparent owner, cannot be prejudiced by the revelation of the real ownership, if they have acted in good faith.

Ribet, Agent, vs. *Bataille et al.*, 1171.

POSSESSION.

A proceeding by seizure and sale of land in the possession of third parties for more than thirty years, cannot have the effect of forcing them to assume the attitude of plaintiffs in a petitory action. Their position is that of defendants in such a suit. Until a better title be shown and recognized contradictorily with them, they can securely rely on their possession.

L. Lavedan vs. *F. F. Trinchard*, 540.

A possessor in bad faith is not entitled to remain in possession until the value claimed by him for improvements put upon the land, and which the former owner has been condemned to pay to him, has been reimbursed.

J. U. Payne vs. *T. C. Anderson et al.*, 977.

PRACTICE.

A default can be confirmed *two* judicial days after it is entered. The law does not allow the defendant the *third* judicial day after the taking of the default to file his answer, unless no confirmation has intervened. A judgment by default, which is confirmed on the *third* judicial day following the default, is seasonably rendered.

The appeal being frivolous, damages are allowed.

R. J. Taney vs. *J. S. Meilleur*, 117.

It is not enough for a party litigant or his attorney to place in the hands of the Clerk of Court a document which is to be filed. Such party or his attorney must see that the document *be actually filed* by the Clerk, or he must bear the consequences of the non-filing.

J. Ford and Wife vs. *Brooks, Constable*, 151.

Where a Judge, after overruling an exception to his jurisdiction *ratione materiæ*, renders a judgment on the merits of the case, without passing on that portion of the demand which it was claimed was not within his jurisdiction, this is virtually sustaining the exception, and the defendant has no occasion to complain.

On application for a certiorari and for a prohibition, the proceedings will not be annulled or restrained.

State ex rel. Smith Bros. vs. *Judge, etc.*, 738.

There exists no essential difference between a discontinuance and a voluntary non-suit. The latter does not interrupt prescription, whatever the intention to the contrary may appear. It is equivalent to an abandoment.

A plaintiff is entitled to make either, and the Court is bound to grant that made before judgment. However, when made and allowed, such motion cannot, in a case in which a reconventional demand has been made, destroy or affect the right of the plaintiff in reconvention to a prosecution and trial of his demand.

A plaintiff in reconvention has the right to oppose any such motion which would produce such effect.

Where the motion is allowed during the course of trial, the rights of the plaintiff in reconvention must be reversed, and where he insists upon it, the trial of his demand must be proceeded with as though the withdrawal had not taken place.

A. E. Davis vs. *C. Young*, 739.

Where objections to trial are based on alleged irregularities in ordering, making and submitting a report of experts, and there is no occasion to complain of the mode in which the same was made and returned, and where testimony shows the report to be correct, the ruling of the court will not be disturbed.

A rule, taken by experts to have their fees taxed, should have been

PRACTICE—*Continued.*

served on all the parties to the suit. Service on the plaintiff alone is insufficient. The judgment making such rule absolute, although repeated in the judgment on the merits, will prove of no effect.

State vs. *Gauthreaux et al.*, 1168.

PRESCRIPTION.

Ordinances of the City Council of New Orleans recognizing the claim of an attorney, who had been employed as special counsel of the City in important litigation, and providing for part payments of his fees, interrupt prescription on the claim.

J. McConnell vs. *New Orleans*, 273.

An action for rents and revenues of immovable property against an evicted possessor is barred by the prescription of one year, if the party evicted shows that he was a possessor in good faith.

Such an action can be maintained against the possessor only, and for the time of his occupancy.

It ceases against the first possessor from the time of his transfer to another party.

Succession of F. V. Gillespie, 779.

The hypothecary action against the third possessor is not barred by the prescription of ten years, when the principal obligation has been kept alive, and the mortgage securing it has been properly inscribed and reinscribed.

E. J. Smith vs. *W. W. Johnson*, 943.

An attorney's fees are due on the termination of the litigation, and prescription runs from that date. A continuity of services by an attorney, in other matters, from year to year, cannot interrupt that prescription.

R. J. Looney vs. *Levy, Liquidator*, 1012.

PRINCIPAL AND AGENT.

A party who takes an agency for the sale of mineral waters, for which he binds himself at a stipulated price, is not liable for the payment of a consignment of such goods shipped subject to his order by his principal, in the absence of an order for such consignment from the agent.

J. Frank vs. *F. Hollander*, 582.

An agent or debtor who is instructed by his principal or creditor to remit, without indicating any particular mode of remittance, and who does remit in the customary mode, is not responsible further.

If the same care, prudence and judgment is exercised in purchasing a Bill of Exchange for a remittance, as a prudent business man uses in the conduct of his own affairs, the unexpected failure of the banking

PRINCIPAL AND AGENT—*Continued.*

house drawing the Bill, before it can be presented, will entail no responsibility on the purchaser of the Bill.

The payee of a bill is estopped from holding its agents or debtor, who purchased it under instructions, responsible, after he has elected to treat the bill as his own and received a dividend upon it.

Wrecking Co. vs. *Underwriters et als.*, 803.

A cotton factor who, by direction of his customer, invests the latter's funds, is not responsible to him for illegality of the investment.

Allen, West & Bush vs. *Whetstone et al.*, 846.

Where the practice or custom of a factor is to insure consignments of produce, and this is brought to the knowledge of his consignor by uniform charges for insurance in his accounts rendered, the factor will be deemed to have continued that custom until he gives notice to the consignor of the change, and is responsible for any loss, consequent upon his failure to insure, before such notice reaches the consignor.

If the factor has been in the habit of insuring produce without instructions, and he deviates from it without apprising his consignor, and loss ensues, he will be liable.

Area & Lyons vs. *Milliken*, 1150.

An invalid contract by an agent will be held as ratified by the principal, after a tacit acquiescence and a long silence.

This rule applies to a sale of stock made by a pledgee, which, though invalid in itself, is confirmed by a settlement, under such sale, subsequently made between the pledgor and the pledgee.

Lafitte, Dufilho & Co. vs. *Godchaux*, 1161.

The power to compromise and to sell property implies, that of giving it in payment of a just debt of the principal. What the agent could have done indirectly, he can accomplish directly.

F. A. Darling vs. *Lehman, Abraham & Co.*, 1186.

PROHIBITION.

A prohibition does not lie to arrest the execution of a judgment rendered by a court vested with jurisdiction over the subject matter.

A suspensive appeal from a judgment dismissing, on exceptions, the intervention of an adjudicatee contemplating the erasure of mortgage inscriptions, does not strip the court of jurisdiction over a demand to coerce payment of the price of adjudication retained by such adjudicatee at a judicial sale.

Where the judgment rendered is erroneous and aggrieves the adjudicatee and is such as could not have been legally rendered without notice to him, and he was not properly made a party, the law does

PROHIBITION—*Continued.*

leave him without a remedy to suspend or arrest the execution of such judgment.

The writ of prohibition is not designed to stay the enforcement of such judgment.

State ex rel. Moses Lobe & Co. vs. *Judge, etc.*, 236.

A prohibition is not a writ of right and issues only in the sound discretion of the court.

It does not lie to prevent a District Judge from entertaining jurisdiction over a suit for an injunction to arrest the execution of a *fi. fa.*, issued by a court of a different territorial jurisdiction against a party to the suit, domiciled within the jurisdiction of the first Judge, where, under the force of circumstances, it becomes necessary to ward off an immediate injury, otherwise unavoidable.

The rule that each court controls the execution of its judgment is subject to such an exception in favor of both the party cast in the suit and of third opponents.

State ex rel. Osborne vs. *Judge, etc.*, 538.

PROVISIONAL SEIZURE.

A writ of provisional seizure was properly dissolved where the lessee offered to deliver cotton to the lessor, then in the ginhouse, sufficient to pay the rent, or to give a draft for the same, the offer being made on the day the rent fell due.

Nor is the lessor entitled to the writ for the value of the repairs which the lessee failed to make, where no demand for any specific amount was made on this account, and where it appears from the contract of lease it was stipulated, that on the payment of money rental the lessee was authorized to ship or dispose of his crop.

S. D. Browne vs. *J. W. Clarke*, 290.

PUBLIC OFFICERS.

The Superintendent of Public Education has no authority in law to appear in person or by private counsel in any suit or other legal process in which he may be a party or interested in his official capacity, but must be represented by the Attorney General or local District Attorney. Any suit instituted by such a ministerial officer in his official capacity, by a private counsel, shall be dismissed by the court *ex proprio motu*, or on motion. Act No. 21 of 1872.

Fay, Superintendent, etc. vs. *Auditor, etc.*, 368.

Act No. 178 of 1867, entitled, "An Act to establish the office of Inspector of Hay, and to regulate the duties pertaining to same," created but one office with three persons to perform the functions thereof. Hence, the emoluments of said office, consisting of fees,

PUBLIC OFFICERS—*Continued.*

must in law be equally divided between the three Inspectors composing said office. The action of two of the Inspectors for the purpose of compelling the third Inspector to account for the inspections and collections made by him is a joint action, in which plaintiffs properly joined in the same action.

W. E. Clark et al. vs. *P. H. Waters*, 451.

A police jury has the power to remove a treasurer appointed by it.

There exists no antagonism between R. S., Sec. 2743 and Article 201 of the Constitution. The right of removal delegated by the statute was not abrogated by the Article. The constitutional provision relates to certain parish and municipal officers elected by the people or appointed by the Executive, and does not apply to subordinate functionaries chosen by a police jury.

E. Richard vs. *J. Rousseau*, 933.

RECONVENTION.

A plea in reconvention must be established with legal certainty. Hence, a party who receives a consignment of perishable goods, without examination and inspection at the time of delivery, and who discovers two months later the inferior quality or damaged condition of the goods, cannot recover in reconvention the price paid for such goods, by the reason of his failure to learn the damaged condition of the goods when delivered.

J. Frank vs. *F. Hollander*, 582.

RECUSATION.

When a party to a suit, fully aware of the relation which the Judge bears to the cause, as exhibited by his own pleadings, fails to recuse him, and submits his cause for determination, he will not be heard, after judgment, to assign the incompetency of the Judge as a ground for new trial. In this case there was no ground for recusation of the Judge.

W. A. Ricks et al. vs. *E. Gantt*, 920.

REDEMPTION.

Where a sale is made with the right of redemption, and the term expires within which the price is to be returned, it is not required that the purchaser should have the failure to redeem judicially declared before he can become or be regarded as the absolute owner of the property. No divestiture of the right of redemption results unconditionally from the default of the seller.

Leasing the property by the vendor after the time for redeeming has passed, in the absence of error or fraud, concludes him from assert-

REDEMPTION—*Continued.*

ing title thereto. When after the sale the vendor continues to occupy and cultivate the land, and the purchaser to furnish supplies, payments made by the former to the latter, with or without agreement to that effect, must be imputed to the privilege for such supplies.

Where parties have the legal capacity to contract, mere ignorance on the part of one of them, and inability from such cause to understand the contract, after it is read to him, is not sufficient ground to avoid the same.

P. Jackson vs. *Lemle et al.*, 855.

The burden is on the vendor, in a sale with the pact of redemption, to prove that the contract was one of mortgage or of *antichresis*, when possession was given to the purchaser.

Written evidence alone is admissible between the parties, when fraud or error is not alleged.

Interrogatories may be propounded to the vendee, but his answers, uncontradicted by written evidence, showing the reality of the transaction, will conclude the vendor.

If not exercised within the delay agreed, and according to the terms of the contract, the right of redemption will be considered as forfeited.

O. F. Mulhaupt vs. *P. Youree*, 1052.

REGISTRY.

Registry of act of sale under private signatures is binding as notice to third persons, though without proof of signatures, as directed by Rev. C. C. 2253.

A party to a written contract cannot avail himself of error resulting from failure to read the same before signing, where not induced to do so by the other party thereto.

Allen, West & Bush vs. *Whetstone et al.*, 846.

REMOVAL TO U. S. COURT.

An appeal lies from an order of the District Court removing a cause to the U. S. Court.

Such appeal can be taken by motion in open court as appeals are taken from other judgments.

The enforced appearance of the appellant from such order in the U. S. Court, pending such appeal, is not an acquiescence in, or voluntary execution of, the judgment or order appealed from.

Only suits involving rights depending upon a disputed construction of the Constitution and laws of the United States are removable from the State to the National Courts under the words of the Act of Congress, "arising under" that Constitution and those laws.

REMOVAL TO U. S. COURT—*Continued.*

There must be some question actually involved in the case, depending for its determination upon the the correct construction of the Constitution, or some law of Congress, or treaty, in order to sustain the Federal jurisdiction under the clause containing those words.

When the interest of one or more parties to a suit is so bound up with the others, that its legal presence as a party is an absolute necessity, it is an indispensable party, and must be so considered on an application to remove the whole suit.

Congress, in determining the jurisdiction of the Circuit Courts over controversies between citizens of different States, has not provided for the removal from a State Court of a suit in which there is controversy not wholly between citizens of different States, and to the full or final determination of which one of the indispensable parties on the side seeking the removal is a citizen of the same State with one or more of the parties against whom the removal is sought.

New Orleans vs. *H. O. Seixas et als.*, 36.

An order refusing the removal of a cause from a State to a Federal Court, is an interlocutory decree, which cannot work irreparable injury and is, therefore, not appealable.

Succession of Bodenheimer, 1033.

RES JUDICATA.

A judgment rendered by a competent court, in an action for the nullity of a previous judgment rendered by the same court, is *res judicata* of the grounds alleged in nullity, and will be a bar to an application by the same party to a writ of *certiorari* in the Supreme Court, with a view to annul the same judgment on the same alleged grounds of error.

State ex rel. Marrero vs. *Judge, etc.*, 214.

An allegation made by a party defendant in answer to suit, but not considered by the court or disposed of in the judgment, cannot support the plea of *res judicata* when it is made the basis of a suit by the same party against one of his co-defendants in the previous suit.

N. Hoggatt vs. *V. Thomas et als.*, 298.

A judgment, affirmed on an appeal, recognizing a homestead right under Sec. 1691 *et seq.* R. S., constitutes *res judicata*. It continues in force until set aside. As long as it remains in force the property cannot be legally seized, and the sale can be enjoined.

Objection to the introduction of evidence under an answer to the injunction suit, averring a state of facts different from that in exist-

RES JUDICATA—*Continued.*

ence when the judgment was rendered, is well taken and the proof must be excluded.

Damages claimed for such seizure cannot be allowed.

Mrs. M. M. Calvit vs. *J. A. Williams*, 322.

Judgments of homologation of accounts in insolvent successions, directing a distribution of funds, do not invariably constitute *res judicata*, so as to prevent a review of the distribution and directions for a different one.

Succession of M. Coughlin, 343.

An *ex-parte* order of a court recognizing a party as testamentary heir of an absentee and putting him in possession as such, is not *res judicata* as to third persons, and may be collaterally questioned when offered as the title in virtue of which property is claimed and the rights of third persons sought to be disturbed. A party claiming as testamentary heir must find the rights in the will, and not in the *ex-parte* order of a court.

S. Dalton vs. *R. C. Wickliffe*, 355.

An *ex-parte* order of court recognizing one as heir of deceased person and putting her in possession of his succession, lacks the essential elements of the thing adjudged and cannot be pleaded as *res judicata*.

An *ex-parte* order of court, such as hereinbefore described, is not such "title" as will enable the party who obtained it to plead the prescription of ten years under color of title against an attack of creditors of the deceased.

Succession of J. A. Lampton, 418.

It matters not under what form, whether by petition, exception, rule or intervention, the question be presented, whenever the same question recurs between the same parties, the plea of *res judicata* estops. Hence, a judgment maintaining an exception of no cause of action, urging that plaintiff prays for relief, which cannot be granted according to law, will support the exception of *res judicata* to a petition disclosing the same cause of action between the same parties and for the same relief.

W. E. Sewell vs. *J. H. Scott*, 553.

The heirs of a deceased testator sue to recover his estate from the universal legatees, alleging that the last will of the deceased was null and void for certain causes of nullity which are set forth in the petition.

Judgment is rendered decreeing the will valid, and the title of the universal legatees, or of those holding under them, to the estate sued for, a good one, the latter having been made parties to the suit.

RES JUDICATA—*Continued.*

After this decision another suit is instituted by the legal heirs against the executors alone, propounding the same causes of nullity as before, and praying that the order probating the will be annulled and set aside, and the will declared null and void. The owner of the estate, by title derived from the universal legatees, who was a defendant in the former suit, intervenes in this last suit and resists the pretensions of the plaintiffs on the same grounds as before.

Held, that the judgment in the first suit could be pleaded as *res adjucata* to the demands of the plaintiffs in the last or present one, and that this plea was properly sustained.

Heirs of Hoover vs. *Hoover, Executor*, 573.

RESPITE.

On an application for respite the usual order staying proceedings against person and property is lawful and competent.

The court granting such order has power to enforce it, and to annul and set aside acts done in violation thereof.

The privileged creditors who, under Art. 3095, C. C., are excepted from the operation of respite proceedings, are those whose privileges result from the nature of their debts. It does not include privileges resulting merely from seizure. 24 An. 559.

Widow de St. Romes vs. *Creditors*, 801.

A forced respite cannot be attacked collaterally by a creditor, on the ground that the debtor has violated the terms thereof.

Such a respite resulting from a judgment must stand and remain in full force, until avoided or set aside in a direct action.

T. C. Anderson vs. *Duson, Sheriff*, 915.

REVIVAL OF JUDGMENT.

As long as executors have not been discharged, they are amenable to a suit to revive a judgment obtained against the deceased testator.

The cancellation in part of the judicial mortgage, securing the judgment as to stated real estate, does not amount to the extinguishment of the judgment sought to be revived. The security may be abandoned or lost, but the debt continues to exist until extinguished. Such defenses can only be urged in an hypothecary action.

In a suit to revive, the only questions are, was a judgment rendered; was it extinguished, and if not, is the suit to revive in time?

Mrs. Beall vs. *Succession of Elder*, 1022.

REVOCATORY ACTION.

In an action by the transferree of a judgment against a judgment debtor, the latter will not be heard in charging the simulation and nullity of the transfer by the original creditor to the transferree, unless he shows not only that there was fraud between the contracting parties, but that he was injured thereby.

To succeed in such a defense, the complainant must base his attack on the allegations and the proof required by our law of a complaining creditor in an action of revocation, or in declaration of simulation.

F. Long vs. *J. A. Klein*, 384.

Though the vendor was in fraud, when the purchaser paid a sound price, and is not shown to have been cognizant of the fraud of the vendor, or of the fact of his insolvency, the property cannot be reached, even through a revocatory action.

Where the property of the innocent purchaser has been thus illegally seized and sold, the party in fault is liable to the owner for the full value of the property, although part of the proceeds of the sale has been applied to pay a debt for rent due on the property in favor of a third person claiming same by third opposition. 6 R. 385.

L. Kee & Co. vs. *Smith Bros., etc.*, 518.

SALE.

The sale of a commercial establishment, together with the good-will thereof, does not preclude the vendor from the right of opening a similar establishment in the same vicinity within a short time after the sale, in the absence of an express understanding or stipulation, under which the vendor had obligated himself not to engage in or pursue a similar business within a limited space or for a specified time. Good-will is a proper subject of trade, bargain and sale; but in a sale of good-will, courts cannot imply the additional contract or obligation not to do business on the part of the vendor.

The doctrine finds its support in authorities under the Civil Law as well as under the Common Law.

D. Bergamini vs. *B. M. Bastian*, 60.

A vendor of cotton is entitled to have the sale annulled for non-payment of the price when vendee is in actual or constructive possession.

The fact that the vendee has delivered the cotton to a creditor of his, the proceeds to be applied to the payment of his debt, cannot be set up by such creditor to justify a claim to the ownership of the cotton.

The ownership did not thereby pass. It continued in the vendee, at

SALE—*Continued.*

whose risk the thing remained. The creditor's possession, after such delivery, is that of the vendee.

Such a transaction is not a *dation en paiement.* A consent, a price and delivery were necessary, but a weighing was not indispensable.

Where special defenses are not set up, the Court cannot supply them.

Allen, Nugent & Co. vs. *Ben. Buisson,* 108.

Where one firm buys cotton with funds furnished by another, which, under the agreement, is to be entitled to the cotton from the date of the purchase, the bills of lading for the cotton with the exchange drawn against it, to be delivered to the firm furnishing the funds, that firm is entitled to cotton thus purchased, in hands of the firm making the purchase.

That right cannot be defeated by the death of one of the partners of the firm purchasing the cotton, and the delivery of the cotton on hand when the death occurs, to the firm with whose funds it was purchased under the agreement stated by the surviving partners, is valid.

The receiver of the partnership, subsequently appointed, cannot disturb such a delivery.

An exception to one's capacity to sue must be pleaded before issue joined.

Legendre, Receiver, vs. *Seligman, Hellman & Co.,* 113.

The law does not and cannot sanction or maintain a sale of property by the original owner or by his vendee during the pendency of a revocatory action instituted by a creditor of the original owner, seeking to avoid, in its effect as to him, an alleged fraudulent sale of the same property by his insolvent debtor.

The property thus claimed to be liable for the payment of his debt by a creditor cannot be alienated pending his action so as to prejudice his right.

New Orleans vs. *A. Marchand,* 222.

Where a sale of goods and merchandise is real and not simulated, and delivery has been made, a creditor of the seller must attack and annul the sale as in fraud of his rights, before he seizes the goods to satisfy his judgment against the seller.

T. J. Majors vs. *Dennis, Sheriff,* 336.

SEQUESTRATION.

The fact that a party to the suit requests it, does not deprive the court of the power to order *ex-officio* a judicial sequestration without affidavit or bond.

Allen, West & Bush vs. *Whetstone et al.,* 846.

A release bond, furnished to set aside a sequestration, in furtherance

SEQUESTRATION—*Continued.*

of an order made on the petition of one claiming to be the agent of the plaintiffs, and represented to be such by the counsel of the latter, will be considered as the deed of the plaintiffs, when signed by such party in their behalf.

In default of a delivery of the property released on such bond, after judgment declaring it to belong to the defendant, the plaintiffs, as principals, and their surety, will be held responsible for the value of the same.

H. Materne vs. *Lion et al.*, 988.

SERVITUDES.

Where the owner of two lots, with buildings on them, sells one of them, and between them an apparent sign of servitude, such as windows, exists, and the deed of sale is silent respecting the servitude, it shall continue to exist in favor of the lot which has been sold.

The circumstance that the blinds to the windows were closed and boards nailed across them at the time of sale, and had been continuously for many years, will not change the apparent servitude, or extinguish it. In order to constitute an extinguishment of it, the works erected to present an obstacle to the exercise of the servitude must be of a permanent and solid kind, and the obstacle thus presented must be absolute. Non-user of a window, or inability to use it because of obstructions apparently temporary, will not be a release or extinguishment of the servitude.

Water pipes, gutters, iron staples driven into a wall, and such like, will constitute a servitude upon one lot in favor of another lot, when erected by the owner of both and used during his ownership, and this apparent servitude will continue upon the lot owing it after it has been sold.

Screens erected on a lot, which obstruct the view over it from the house on an adjoining lot, but do not impede or prevent the opening of the window shutters in such house for the enjoyment of so much light and air as can be had by the opening of the shutters merely, are not an obstruction to the enjoyment of the servitude of the windows, which can be successfully complained of.

M. Taylor, Wife, etc. vs. *A. Boulware*, 469.

SLANDER OF TITLE.

In an action for slander of title the verity and sufficiency of plaintiff's title is not at issue. The action admits of three defences: 1st, denial of plaintiff's possession; 2d, denial of the slander; 3d, admission of the slander. In the last case, if the admission of the slander be unaccompanied with averments of better title in

SLANDER OF TITLE—*Continued.*

defendant, the judgment shall be one ordering the latter to bring suit within delay fixed and establish his pretensions; but if the defendant accompany his admission with averments of his own title, the court may proceed to investigate said title in the same action, in which case defendant becomes the actor, with the *onus* on himself, and bound to succeed on the strength of his own title, and not on the weakness of his adversary's.

S. Dalton vs. *R. C. Wickliffe*, 355.

SUCCESSIONS.

In a succession where the deceased has left heirs of age and a minor heir, and in which he left a will, making special legacies of movable and immovable property, and appointed testamentary executors, the heirs of age cannot dispossess the executors, before an inventory is completed, and a tutor is legally qualified for the minor heir, and thus avoid an administration. In such a case, the distribution of the legacies is an act of administration which must be performed, as indicated in the will, by the testamentary executors, and an administration therefore becomes necessary.

Succession of Mrs. T. Baumgarden, 127.

Where the *mortuaria* proceedings in a succession show a full administration, closing with the putting in possession of the legatee or testamentary heir, and the discharge of the succession representative, the proceedings cannot be reopened and another administration inaugurated.

Articles 1067 *et seq.* of the R. C. C. have reference to successions actually under administration and not to such as have been thus wound up. They were intended for the protection of new, or straggling creditors, not previously known.

C. Atkinson vs. *Mrs. E. Rodney et als.*, 313.

Where a judgment is rendered striking out an unproved item on the passive side of a succession account and adding the amount to the balance previously struck, for distribution among ordinary creditors, and where, before such distribution has taken place, the creditor whose claim was disallowed for want of proof has established the same by sufficient evidence, the distribution first ordered must be modified and the proved claim ordered to be paid.

Creditors who have been paid in conformity with a decree of distribution, in case of deficiency can be compelled to refund the proportion which they are bound to contribute, in order to give new creditors an equal part.

SUCCESSIONS—*Continued.*

The doctrine in the Succession of Warren, 4 An., requiring proof in insolvent estates, in addition to notes held by creditors, must not be carried too far.

Succession of M. Coughlin, 343.

An universal legatee, who has also qualified as executrix, and who, in a proceeding to compel her to give bond, has appeared and been condemned as executrix, and, on failing to furnish bond, has been destituted, is bound to render an account as executrix to her successor duly appointed, and cannot, in a proceeding for that purpose, be permitted to deny her quality as executrix, and set up that she had accepted unconditionally as universal legatee and had held the estate, not as executrix, but as owner.

Succession of J. Frazier, 381.

Where an application is made for the appointment of a curator, administrator, or dative testamentary executor, notice of the application should be published for ten days in the manner prescribed by law. If no opposition is made thereto, and this fact is made known to the Judge, he should thereupon make the appointment, upon the applicant giving the required bond and taking the prescribed oath. Before such appointment is made a tender of a bond is premature; and the appointment of another party upon an allegation that the first applicant had failed to give a sufficient bond, is illegal, where such first applicant had never been appointed, and where only the notice of his application had been published.

Notice of such application must precede the appointment.

Where an appointment has been made and the party fails to qualify in ten days thereafter, the appointment is vacated.

Succession of Mrs. T. P. Gusman, 404.

A man dies intestate, leaving an estate consisting of property held in community with his wife, who survives him. The wife soon after dies, leaving a last will. The major heirs of the husband obtain an order putting them in possession of his estate, consisting of his interest in the community. *Held*, that the testamentary executors of the wife's will, and the tutor of a minor heir of the two deceased spouses, had an interest in said order sufficient to entitle them to an appeal therefrom.

A husband dies intestate, leaving three heirs of age and one minor, the issue of his marriage with the wife who survives him, to an estate held in community with the surviving wife. The wife shortly after dies, leaving a last will and appointing a tutor to the minor child of herself and deceased husband. The executors of the wife

SUCCESSIONS—*Continued.*

and the tutor of the minor child, there being no debts except the debt of the husband's succession to the succession of the wife, have no right to oppose the putting into possession of the heirs of age to the extent of their interest in the succession of their father. If any inconvenience or confusion is caused thereby, it can be promptly adjusted by a partition among the heirs. The minor heir cannot be prejudiced by such proceeding, and his tutor is without interest to oppose.

Succession of N. A. Baumgarden, 675.

The administrator of a succession is responsible for the difference of the appraised value of movable effects and the price which they brought at a sale on a second offering made on the same day on which the first offering was made, when such sale was made for what the property would bring, without reference to appraisement.

No law in this State compels the administration of a succession to lease its property at auction.

An administrator who acknowledges in writing a claim against a succession, and places such a claim on his first tableau, will be estopped from afterwards contesting such claim, unless he pleads and clearly proves that he had acted through error, caused by the fraud of the creditor.

Succession of W. L. Richmond, 858.

Oppositions to accounts of administration may be filed after the expiration of legal delays of the public notice, provided they be filed before the homologation of the account.

All payments made by an administrator without the order of the court are unauthorized and are made at his own risk.

Clerks in the District Courts have no authority in law to prove tableaux of debts, or homologate accounts of administration, or to authorize the payment of debts by administrators. Act 106, 1880.

Succession of G. W. Price, 905.

There is no provision of our law that forbids an administrator from buying property mortgaged to pay a succession debt, and where the proceedings are regular and free from the imputation of fraud, and the sale has been followed by an undisturbed and continuous possession of more than ten years, the purchaser is protected by prescription.

Nor will the fact that the sale was made upon a mortgage note due the succession, which was credited with the amount of the adjudication, vitiate the sale if the administrator charges himself in his account with said amount.

W. L. Sojourner vs. *E. A. Fourney*, 918.

SUCCESSIONS—*Continued.*

Where an administrator suffers a valuable plantation, mortgaged to the succession, to be sold for taxes for a nominal sum and buys it in through one of the heirs interposed, who subsequently sells it, but the entire price—cash and credit—goes into the hands of the administrator, such purchase and sale enures to the benefit of the succession. And where two of the notes representing part of the price are delivered by the administrator to an heir who sues thereon, a creditor of the succession may intervene and have said notes declared the property of the succession.

E. & E. Thomas vs. *N. Bienvenu*, 936.

The *légitime* of a father or mother, or both, in the testamentary succession of a child deceased without posterity, is *one-third* and not *one-fourth*, and this to the exclusion of brothers and sisters. The disposable portion in such a case being two-thirds only. Cole vs. Cole, 7 N. S. 414, overruled.

Succession of J. Marks, Jr., 993.

SUPREME COURT.

Where the value of a succession is less than one thousand dollars, this Court has not jurisdiction to entertain any question relating thereto. The amount of the claim preferred against the succession is not the test of jurisdiction, but the fund to be distributed.

Succession of Susan B. Thomas, 19.

The jurisdiction of this Court attaches to a suit in which one thousand dollars and interest and five per cent. attorney's fees thereon are claimed. The fees do not grow out of the capital and are no interest thereon. They constitute a distinct item of indebtedness.

Mrs. M. Mayer vs. *L. Stahr*, 37.

Where an administrator charges himself with $1500 in his account, as the result of a compromise of a twelve months' bond in favor of the succession, and prays that such compromise may be approved by the court, such demand gives this Court jurisdiction of an appeal from a judgment rendered on an opposition to the account, although the cash fund proposed to be distributed by the account and the amount of the inventory of the succession is less than $1000.

State ex rel. Muse vs. *Judge, etc.*, 215.

A case having been ordered to be stricken from the docket of the Supreme Court under the erroneous impression that the record contained no order of appeal will, on proper showing, be reinstated, as the order complained of is not a final decree in the cause.

S. D. Browne vs. *J. W. Clarke*, 290.

SUPREME COURT—*Continued.*

In an action of boundary by the owner of unimproved lands, the only matter in dispute is the value of the lands included between the two contested boundary lines, and unless appellant shows that the value of such lands exceeds one thousand dollars, the Supreme Court is without jurisdiction and the appeal must be dismissed.

S. Lombard et al. vs. *H. F. Belanger et als.*, 311.

In Teal vs. Pirtle, 34 An. 892, we held that, where in an action for account, the plaintiff alleged a certain sum as the amount which he claimed as due to him, that allegation fixed the limit of his demand. In this case the plaintiff claims $1100 as the amount due him on proper accounting, for which he prays. The defendant answers, admitting $173 as due. The difference, $927, is the only *amount in dispute*, and excludes our appellate jurisdiction. 33 An. 1089; 26 An. 291.

H. Denegre vs. *P. S. Moran*, 346.

The test of jurisdiction of the Supreme Court in a suit by injunction, when the writ is obtained by the judgment debtor, who is the owner of the property seized, is the amount of the judgment injoined. *Aliter*, when a third person obtains the writ to prevent the sale of his own property to pay a judgment against another.

F. Francisco vs. *Gauthier, Sheriff, et als.*, 393.

Where the nullity of a tax sale is decreed and case remanded to ascertain amount of taxes paid by the evicted purchaser and the value of improvements made by him, for which reimbursement is claimed by reconventional demand, and the case is again tried on this remaining issue, and a second appeal taken; *held*, that this Court is without jurisdiction where the amount of such reconventional demand does not exceed $1000.

On the merits: same as in preceding case 8820.

E. Davenport et al. vs. *N. K. Knox et als.*, 486.

The alleged value of the property in dispute, contained in a supplemental petition filed by plaintiff, will be the test of the amount in dispute in the controversy, even when a larger amount had been alleged in the original petition.

In cases arising since the organization of the present Courts of Appeal, the Supreme Court has no authority to transfer to such tribunals cases which are not of a sufficient amount to vest jurisdiction in this Court.

H. Groebel & Co. vs. *L. Ristroph et als.*, 490.

Where the allegations of neither party disclose that the amount in dispute exceeds one thousand dollars exclusive of interest, the Court will dismiss the appeal *ex proprio motu*.

C. Gross vs. *P. Herman*, 496.

SUPREME COURT—*Continued.*

A judgment rendered by a Circuit Court of Appeals in a case within its jurisdiction is final and cannot be reviewed by the Supreme Court.

Hence, in such a case, this Court will not interfere with the proceeding of the Circuit Court, when, in an appeal pending before it, the papers are destroyed by fire, and the Court sets aside the judgment appealed from and remands the cause to the District Court to be tried *de novo*, with the view to reinstate the pleadings, the evidence, and other papers in the case.

The Supreme Court will decline to pass on the correctness of such a ruling.

D. C. Brown vs. *E. M. Ragland*, 837.

When, in a case unappealable to this Court on the main demand, but appealable on the reconventional demand, the verdict of the jury is for a "balance," and the judgment upon it is in accordance, this Court cannot review the merits of the controversy between the litigants without unavoidably considering the main case. It can neither affirm nor reverse the judgment for correction or incorrectness.

There should have been two findings and, if correct, the judgment should have been in consonance.

The District Judge found the verdict erroneous, and should have granted a new trial.

J. M. Defee vs. *C. D. Covington*, 886.

This Court has no jurisdiction over an opposition to an executor's account when the amount claimed is less than one thousand dollars, and there is no other fund to be distributed. Succession of Duran, 34 An. 585, affirmed.

Succession of E. McDowell, 1025.

When the Supreme Court is not in session, an application for any of the remedial writs may be entertained by the Chief Justice or any of the Associate Justices.

A provisional order for any such writs thus issued by any one of the Justices is valid and binding, as though it had emanated from the Court.

Such an order is not a judgment; it is valid without the concurrence of the majority of the Judges, and need not be supported by reasons.

State ex rel. Behan, Mayor, et al. vs. *Judges, etc.*, 1075.

Under its supervisory jurisdiction, the Supreme Court will entertain a *writ of certiorari* against a justice of the peace, for the purpose of ascertaining the validity of his proceedings in an unappealable case. If, on examination of the proceedings, it appears that the magistrate has rendered judgment against the relator without

SUPREME COURT—*Continued.*

giving him a hearing according to law, the judgment thus rendered will be annulled and avoided.

State ex rel. Montague vs. *Justice, etc.*, 1101.

In an injunction suit to prevent the continuance of the acts complained of, plaintiffs alleging that those acts, if persisted in by defendant, will cause them more than $2000 damages, this Court has jurisdiction of the case.

W. T. Levine et al. vs. *B. Michel*, 1121.

It is only where the inferior Judge exceeds the bounds of his jurisdiction, or is guilty of an usurpation or abuse of his authority, that this Court, under the rules heretofore propounded, will interpose its supervisory powers.

So, where a person is sued personally for an amount within the jurisdiction of the court and seeks to avoid a personal liability, by pleading that the act or omission complained of, if done at all, was in his capacity of syndic of an insolvent estate then being administered in the District Court, which court, it is averred, has sole jurisdiction of the demand, and the plea is overruled and judgment rendered against the defendant personally, this Court will not interfere.

The plea in avoidance and its legal effect was a proper matter for the determination of the Judge.

E. W. Troegel vs. *Judge, etc.*, 1164.

SURETY.

An agreement by which one of two sureties on a bond binds himself to hold his co-surety harmless from any liability or loss on account of the bond, is not a promise to pay the debt of a third person, or a contract of suretyship; it forms no part of, but is distinct from the bond executed by the parties; it is an original contract between the parties, a contract of general indemnity from the obligor to the obligee, and as such it can be proved by parol testimony.

N. Hoggatt vs. *V. Thomas et als.*, 298.

Under Section 3724, Rev. Statutes, action does not lie against the surety on an administrator's bond "until the necessary steps shall have been taken to enforce payment against the principal." Mere testimonial proof of the principal's insolvency, in absence of judicial determination of that fact or liquidation of the claim contradictorily with him, will not excuse non-compliance with this condition precedent.

F. Gaillard vs. *Widow Bordelon, etc.*, 390.

Solidarity of obligation is not a prerequisite to the possession or exercise of the right of a surety to enforce contribution. The neces-

SURETY—*Continued.*

sary conditions are that the persons must have been sureties for the same debtor, and for the same debt, and the surety who is demanding contribution must have paid in consequence of a lawsuit.

The terms of the Code do not presuppose a joint liability to a common obligee which has been discharged by one of the joint obligors, but the presupposed liability may be several as well as joint.

The party from whom contribution is demanded must have been under a legal obligation to pay at the time payment was made by him who demands the contribution.

E. F. Stockmeyer vs. *H. Oertling*, 467.

In a suit against a defaulting Parish Treasurer and his sureties for funds embezzled by him, the sureties cannot set up as a defense the nullity of the Treasurer's bond, predicated on the failure of the members of the Police Jury who elected him to have taken the oath required by law within the prescribed time. That question cannot be raised in this collateral manner.

St. Helena vs. *Burton et als.*, 521.

A surety on a judicial bond must not only be solvent, but must be good for the amount of the bond.

The burden of proving such capacity is on the party who tenders the surety.

State ex rel. Holyland vs. *Judge, etc.*, 737.

When two bonded employees of a bank are parties to a joint trespass, resulting in a loss to the Bank, thereby violating the conditions of their respective bonds, three groups of solidary obligations arise, viz: those of each employee and his respective sureties, and that of the two co-trespassers with regard to each other. But the members of these respective groups are not bound *in solido inter sese* beyond the limits of their own group.

Where the relations above indicated result from the facts set forth in the petition, the allegations of solidary liability will be construed with reference thereto.

The discharge of the sureties on one bond would not operate the discharge of the principal or sureties on the other bond.

Payment of the loss by the principal or sureties on one bond would not entitle them to subrogation to the rights of the Bank against the sureties on the other bond.

What rights payment by the principal or sureties on one bond might give them against the principal on the other, as a co-trespasser, need not be determined, because said principal does not appear to have been discharged. The discharge of his sureties, although bound *in solido*, did not discharge such principal.

Union Bank vs. *Legendre et als.*, 787.

SURETY—*Continued.*

On a rule against a surety on a bond for a suspensive appeal from a money judgment, which was affirmed, the exigencies of the law are satisfied where the writ issued is seasonably returned *nulla bona*, after demand from the parties and their failure to point out property.

Where the defendant in rule avers that the defendant in writ owns real property in excess of plaintiff's judgment, subject to execution and not encumbered to his prejudice, which was pointed out, the burden is on him to prove the existence of such property, the title of defendant to it, its non-alienation and that, if seized, it will realize or net an amount sufficient to pay the judgment in whole, or reasonably in part.

A judgment creditor is not bound to seize burdened property pointed out, when the attempt to sell would only result in costs, before proceeding against the surety on the appeal bond.

The decision on appeal of the rule against the security cannot be retarded on the statement made in the brief, that since the judgment below against the security the plaintiff has levied on property of the defendant, the sale of which was enjoined and the matter being on appeal. The appellate court is not bound to wait until the determination of such suit, still less until after it is ascertained whether the writ has or not realized or netted anything.

L. Folger vs. *E. C. Palmer*, 814.

An action lies to annul a money judgment against a surety on a sheriff's bond, when it is proved that since the joining of issue, the surety had paid, under judicial compulsion, the full amount for which he had signed the bond. Marcy vs. Praeger, 34 An. 54, affirmed.

J. A. Florat vs. *Handy et al.*, 816.

The prescription of the action against the surety of an administrator does not run from the date of the bond, but only from the time when the right of action against the surety arises, that is, after judgment and other "necessary steps" have been taken against the principal.

When judgment against the principal has been obtained, execution issued and returned *nulla bona*, and insolvency of principal established, no other steps are necessary to justify recourse against the surety.

The liability of the surety is limited by the amount of his bond. When the amount is left in blank in the bond, the law fills the blank with the amount fixed by itself, to-wit: one-fourth over the amount of the inventory, bad debts deducted.

SURETY—*Continued.*

Interest runs on the amount due by the surety from the time when it became due and demandable, viz: after the taking of the necessary steps against the principal.

W. A. Ricks et al. vs. *E. Gantt*, 920.

Sureties, who have already made payment on account of the sums for which they have subscribed a sheriff's bond, are entitled to credit, and can be held for the difference only.

State vs. *Gauthreaux et al.*, 1168.

TAXATION.

Exemptions from taxation are always strictly construed against the exemption. Nothing can be supplied by intendment or inference.

The exemption of buildings and property used exclusively for colleges, or other school purposes, means such buildings as are used for the habitation of a college or school, and such property as is used in and for college or school purposes, such as chemical or philosophical apparatus, and such like.

Neither buildings, nor property of any kind, that is used for revenue or profit, although the revenue is to be applied wholly to the support of a college or school, and the profit is to be expended solely for its benefit, is exempt from taxation under our present Constitution.

State ex rel. Tulane Fund vs. *Assessors*, 668.

Persons engaged in rice milling are manufacturers, and as such are exempt from license under Article 206 of the Constitution.

New Orleans vs. *Ernst & Co.*, 746.

There exists no legislative authority for the assessment or levy of an income tax, under the existing revenue and assessment laws.

B. R. Forman vs. *Assessors, etc.*, 825.

Where a parish has levied an annual tax of ten mills on the dollar, it is without authority to levy an additional tax to pay a judgment against the parish, when it is not shown that the judgment was founded on a contract. The restriction on the taxing power contained in Act 209 of the State Constitution must be enforced in all cases where it does not contravene the inhibitions of the federal Constitution.

Witkowski and Husband vs. *Bradley, Sheriff*, 904.

Act No. 126 of 1882 is the legislation intended to make effective Article 209 of the Constitution, and a tax levied under its provisions is legal and binding.

But Section 2 of said Act, which requires the vote of the majority of the property taxpayers, is antagonistic to the proviso of Article

TAXATION—*Continued.*

209, which requires only the majority of the legal votes cast at the election. That provision of the Act is therefore ineffectual, and the Act must conform in that particular to the constitutional requirement.

The failure to publish the names of all the signers of a petition for a special tax, in excess of the rate as limited by Article 209, will not invalidate the tax.

Mrs. Duperier vs. *Viator, Sheriff, etc.*, 957.

Sawmills are not manufactories within the meaning of the provisions of Article 207 of the Constitution, and are therefore not exempt from taxation.

Jones et al. vs. *Raines, Sheriff*, 996.

However clear may be the power, or even the duty, of the legislature to tax any particular species of property, the burden cannot be imposed until that power is exerted.

Act No. 77 of 1880 had in contemplation the assessment and taxing of shares in money making and dividend paying corporations. It was not designed to embrace corporations like the Cotton Exchange, which is not a money making and dividend paying corporation.

The Court will not pass upon the liability *vel non* to taxation and the regularity *vel non* of the listing of property, in the absence of a law actually providing for its taxation and assessment.

Cotton Exchange vs. *Assessors*, 1154.

Where a tax was duly levied on a factory for the manufacture of articles of wood, by the City of New Orleans, and included in the City budget for 1879, collectible in 1880, an exemption therefor cannot be claimed under Article 207 of the present Constitution, subsequently adopted. That Article had no retroactive effect. The case comes within the scope of the decisions of City vs. Vergnole and Succession of Dupuy, 33 An. 39 and 258.

New Orleans vs. *L'Hote & Co.*, 1177.

TAXES.

The object of this suit was, in substance, to have the Ordinances of the City of New Orleans, levying the 15 mills tax for the alimony of the City and the premium bonds, and levying the 16¼ mills tax for the judgments of the U. S. Courts declared null and void; and also to enjoin the collection of such taxes.

The decision reasserts the constitutionality of the premium bond Act, (Act No. 31 of 1876) as established in previous cases, and the want of the the foundation of the theory that, under the present Constitution, no tax exceeding ten mills on the dollar can be collected.

TAXES—*Continued.*

The nature, object and legal bearings of said premium bond Act are examined at length in the opinion of the Court.

Held, that the premium bond tax should be levied and collected in full, and not, as claimed by the plaintiffs, under the circumstances of the case, only in such proportion as the outstanding premium bonds bear to the whole twenty millions contemplated in the Act of 1876.

H. J. Rivet et al. vs. *New Orleans*, 134.

The payment of taxes, whether due to the State or parish, or to incorporated villages, towns, or cities, can no longer be enforced by suit, but only in the mode provided by the Act of the General Assembly, approved July 5, 1882.

Alexandria vs. *A. Heyman*, 301.

The payment of taxes of whatever kind cannot be enforced by suit since the Constitution of 1879 became operative through the legislation thereunder upon that subject.

Alexandria vs. *Williams et al.*, 329.

A "mechanic who employs assistance" is exempt from a license tax upon his trade, under the clause of the Constitution excepting those engaged in mechanical pursuits from the enumeration of occupations liable to such tax.

New Orleans vs. *T. Bayley*, 545.

The City of New Orleans has no authority to exempt property from taxation or to agree to a commutation.

The stipulation in a contract that a bonus of a certain proportion of gross profits realized shall be paid to the City, provided the property yielding the revenue from which the same are derived shall be exempt from municipal taxation during the existence of the privilege granted, is in violation of the Constitution and must be considered as not made. The nullity of such stipulation renders void the agreement which depends upon it.

The City cannot claim both. It can claim the taxes only and is entitled to the privilege allowed by law. Where the bonus has not been paid as taxes and has been appropriated to purposes other than those to which taxes must be devoted, the taxes cannot be considered as satisfied by the payment of the bonus. Taxes are not compensable. The party who has paid the bonus is entitled to recover as an ordinary creditor only.

New Orleans vs. *Sugar Shed Co.*, 548.

The Statute expressly requires that the taxes levied by the police jury for school purposes shall be paid over by the tax collector directly to the treasurer of the parish school board.

Where the tax collector has unlawfully paid over such funds to the

TAXES—*Continued.*

treasurer of the police jury, the duty to pay over to the school treasurer passed, with the funds, to the treasurer of the police jury, and, on his refusal, is the proper subject of enforcement by mandamus.

State ex rel. Leche vs. *Treasurer, etc.*, 1148.

TAX SALES.

A tax title, regular in form, duly recorded, and accompanied by possession, cannot be attacked collaterally or disregarded by direct seizure of the property held thereunder, in execution of judgments or mortgages against a former owner; at least, unless absolute nullity of the tax title is patent on the face of the deed.

No such nullity being apparent on the face of the plaintiff's deed, his injunction herein, restraining the seizure and sale of the property by a creditor of a former owner, was properly perpetuated.

F. B. Ludeling vs. *McGuire, Sheriff*, 893.

Where, by proceedings absolutely null and void, property has been adjudicated to the State in tax proceedings, and subsequently the State transfers the same by adjudication to third persons, under Act 107 of 1880, the owner, in reclaiming his property, is not bound to make the State a party, and is not remediless because the State is exempt from suit.

Assessment, advertisements, notices, sale of property, in the name of Denègre and Powell, are absolutely null and void when the property had never belonged to such joint owners, but had been owned by Jas. D. Denègre alone from the moment of its severance from the public domain.

Denègre vs. *Gerac et als.*, 952.

A legal assessment is essential to the validity of a tax sale, and where that is wanting, the sale will not be protected by the prescription of two, three and five years. Such sale, however, being made by competent authority, where no nullity is patent on the face of the deed, the purchaser cannot be held a purchaser in bad faith, but is entitled to be reimbursed the legal taxes paid, and for useful improvements. Previous decisions reaffirmed.

Parol evidence is inadmissible to prove the assessment and payment of a special tax, where it is not shown that there exists no written evidence of said facts.

T. J. Hickman et al. vs. *M. P. Dawson et al.*, 1086.

WILL.

A testator gave instructions to his lawyer of his testamentary dispositions, who reduced them to writing. The next day, before the notary and witnesses, one of the latter read from this memorandum

WILL—*Continued.*

to the testator, who repeated the words as uttered to the notary in the presence of the other witnesses; the testator not being able from some transient cause to read the manuscript. *Held*, this was a dictation of the will within the meaning of the Code. There was no suggestion that the will was not in literal conformity to the memorandum, and none that the memorandum was not a faithful expression of the testator's instructions.

If the testator be shown to have been of sound mind and disposing memory at the time of confecting the will, eccentricities of conduct and even partial aberration at other times will not affect his testamentary capacity.

It is, and should ever be, the aim of courts to give effect to wills. Testamentary freedom is too valuable and sacred to be interfered with, and will not be, when testamentary capacity is shown to exist, and the forms of law are complied with.

Testamentary capacity is the ability to comprehend tho conditions of one's property, and the testator's relations to those who may naturally expect to become the objects of his bounty.

M. Godden vs. *Executors of E. Burke et als.*, 160.

The revocation of a will by the act of the testator may be express or tacit. It is express when the testator has declared in writing that he revokes the will, or a particular disposition in it. It is tacit when he has made another disposition repugnant to and inconsistent with the previous one, although nothing is said about revoking it, or when he has done any act which indicates a change of intention, whatever that act may be, provided always the intention to revoke is fairly and legally deducible from it.

Erasures not approved by the testator are considered as not made, and this applies to those erasures which are made of parts or clauses of a paper admittedly existing as a will, and not to that part, the erasure of which would destroy it as a will, such as the signature.

If the erasures do not so obliterate the words that it is impossible to distinguish them, and the Judge considers the erasures important, that is to say, of material words, he shall pronounce the nullity of the will. *Aliter*, he cannot decree its nullity.

The effacement and obliteration of the signature to a will by the testator, if done with the intent to revoke, which intent may be deduced from that and other circumstances, will have the effect of revocation. Any act defacing an existing will, done by the testator, derives its character solely from the intent with which it is done.

Succession of Louis Müh, 394.

The cardinal rule in the interpretation of wills is to ascertain the intention of the testator, and to give effect to it when ascertained.

WILL—*Continued.*

A legacy of "the residue of my property of every description" is an universal legacy. Descriptive words of the different kinds of property composing that residue are not words of limitation, but of illustration.

An universal legacy carries the totality of the property owned by the testator at the time of his death, and includes property acquired after the date of the will as well as that owned at that date, and this is true even when the character or kind of property has been wholly changed in the interim between the making of the will and the death.

Particular legacies which have lapsed by the death of the legatee before the testator, or from other inability of the legatee to take them, fall into the residuum, and go to the universal legatee and not to the heir.

The universal legatee takes everything that has not been validly given away.

Succ. Valentine, 12 An. 286, and Lawson's Case, Ibid. 603, overruled.
Succession of J. Burnside, 708.

In the execution of nuncupative wills under private signature, the law authorizes the testator to cause his will to be written out of his presence and of that of the instrumentary witnesses.

The person who has acted as the *amanuensis* of the testator for that purpose is not disqualified, on that account, from officiating as one of the witnesses to the will, and can be counted as one of the five witnesses required by law.

Presentation of a nuncupative will, under private signature, by a testator, admits, supplies, or dispenses with a formal dictation.

Where the will of the husband and that of the wife, or any two persons, are written out by the same party, on the same day, in favor of the same beneficiary, and are presented by the testators separately to the required number of competent witnesses, with the proper statement, at different times though on the same day, they constitute two disconnected, distinct, and independent acts, and are not amenable to the prohibitions contained in Article 1572 of the R. C. C.

The burden of proving insanity rests on the party alleging it.
Wood et al., vs. *J. S. Roane*, 865.

A will speaks as of the death of the testator, and conveys all the property owned by him at that time, unless a contrary intention manifestly appears. This is true even though the property may have been wholly changed in the interval between the making of the will and the death.

WILL—*Continued.*

The word "property" used in a will has as broad meaning as "estate" or "succession," and is identical with those words.

Succession of Valentine, 12 An. 286, and Lawson case, Ibid. 603, overruled.

Succession of J. Marks, 1054.

WRIT OF ERROR.

A writ of error, though operating as a supersedeas, does not have the effect of reviving or continuing in force the injunction dissolved by the judgment from which such writ of error has been obtained.

But it is also the rule, based upon a principle of comity, that the court from whose judgment the supersedeas has been taken, should not render any decree during the pendency of said supersedeas, which would practically destroy its effects.

Therefore, this Court will not, in the present case and at the instance of the relator, order the payment of an entire fund to him, whilst other parties are also claiming payment out of it, in the Supreme Court of the United States, under a writ of error to this Court, which operated as a supersedeas.

The principles upon which the decision of this Court is based in the Hart case are formulated anew in this case.

State ex rel. Newman vs. *Burke, Treasurer*, 185.